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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 264

PAUL DeLUCIA

VS.

UNITED STATES of AMERICA

PETITION

FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

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APPENDED

Opinion of United States Court of Appeals in this and a related contempt case.

SUBJECT INDEX

	PAGE
The opinions of the courts below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	12
Summary Statement of Matter Involved	12
Argument	20
Summary of Argument	70
Prayer for Writ	73
Appendix	75-88
Opinion of Court of Appeals:	
In case at bar	75
In related contempt case	85

TABLE OF CASES

Accardo ads United States, 208 F. 632	61
Asher ads United States, 147 F. 2d 544	61
Baumgartner v. United States, 322 U.S. 665	30, 56
Boyd v. United States, 116 U.S. 616	25
Bowles v. Dweck, 7 FRD 335	25
Bruno v. United States, 308 U.S. 287	24
Chicot County Dist. v. Bank, 308 U.S. 378	35

PAGE

Corrado v. United States, 227 F. 2d 780 59

Cufari v. United States, 217 F. 2d 404 9

Field Petition, 117 F. Supp. 154, 159 F. Supp. 144 42

Fishman ads United States, 15 F.R.D. 124, 151 25

Ginsberg ads United States, 243 U.S. 472 42

Gruenwald v. United States, 353 U.S. 391, 233 F. 2d 556 ..... 29, 64

Gypsom ads United States, 333 U.S. 264 31

Hope v. Burns, 6 F.R.D. 556 25

Johannessen v. United States, 225 U.S. 227 ..... 7, 11, 41

Klapprott v. United States, 328 U.S. 601 30

Knauer v. United States, 328 U.S. 654, 670 ..... 30, 36

Kusche ads United States, 56 F. Supp. 201, 230 ..... 11, 31, 35

Landon v. Clarke, 239 F. 2d 631 47

Lawn ads United States, 115 F. Supp. 674 27

Maney v. United States, 278 U.S. 17, 22 42

McCaskill v. United States, 216 U.S. 504, 517 50

Meli ads United States, 158 F. Supp. 217, 220 48

Minerich ads United States, 250 F. 2d 721, 726, 730, 731 ..... 32, 48

Minker ads United States, 350 U.S. 179, 217 F. 2d 350 ..... 29, 65

Monia ads United States, 317 U.S. 424 27

PAGE

Montalbano ads United States, 236 F. 2d 757, 263 F. 757 61

Morrison v. California, 291 U.S. 82 21

National Discount v. Holzbaugh, 13 F.R.D. 236 25

Nees ads United States, 245, 319 41

Noto ads United States, 226 F. 2d 953, 351 U.S. 902 ..... 29, 41

Nowak ads United States, 133 F. Supp. 191, 196 .... U.S. 4

Penna R. Co., v. Chamberlain, 288 U.S. 333-340 53

Powell v. United States, 226 F. 2d 269 ..... 24, 28

Richmond ads United States, 17 F. 2d 28 35

Schneiderman v. United States, 320 U.S. 118, 121, 130, 160, 161 ..... 7, 8, 30, 31, 33, 47, 53

Scully ads United States, 225 F. 2d 113 ..... 24, 28

Schwin v. United States, 311 U.S. 616 11

Societe Internationale v. Rogers, ... U.S. 20

Smith ads United States, 56 S.D. 238, 288 N.W. 240 .. 26

Stevens v. United States, 190 F. 2d 880 62

Stromberg ads United States, 227 F. 2d 903 8

Trockmorton ads United States, 98 U.S. 61, 66 35

Tutun v. United States, 270 U.S. 568 7

Zucca ads United States 4

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PETITIÓN

FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States—

May it please the Court:

The petition of Paul De Lucia respectfully shows to this Honorable Court:

I.

The Opinions of the Courts Below.

The unreported opinion of the District Court is shown in the record. (Vol. I, p. 325) The opinion of the Court of Appeals in *United States* v. *De Lucia*, rendered June 18, 1957, has not been reported to date. It is shown in the record. A copy has been appended together with a copy of an opinion in a related contempt case herein pp. 75 to 88.

II.

Jurisdiction.

The date of the judgment to be reviewed is June 18, 1957. Jurisdiction to issue the writ is found in the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A., Sec. 1254) Based on Title 28 S.C. 1940 ed §§ 346 and 347 (Mar. 3, 1911, c. 231, §§ 239, 240, 36 Stat. 1157; Feb. 13, 1925, c. 229 § 1, 43 Stat. 938; Jan. 1, 1928, c. 14, § 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926) (from Revisors Note Title 28 U.S.C.A. Judiciary and Judicial Procedure § 1254 p. 42).

III.

Questions Presented

1. Does the abuse of the Federal Rules of Civil Procedure concerning pretrial practice carried on with the approval of the courts below, call for supervision and correction in this Honorable Court. Does the case at bar raise important questions as to the proper application of the Federal Rules of Civil Procedure?

The record in this case reveals the following procedure. The question submitted is not only one of due process. Does the procedure accord with fairness? Does the pro-

cedure approved below call for supervision by this Honorable Court?

(a) The United States Attorney filed a complaint, supported by an affidavit. The affidavit gave an outward appearance of compliance with the requirement of Congress that these suits require certain preliminary safeguards. The hearing before the District Court revealed that the slightest inquiry would have demonstrated that the allegations to be found in the affidavit were unfounded. Affiant swore to matters known by him to be false, or, on the other hand, swore to them in utter disregard of the truth. The very foundation of the complaint as to matters jurisdictional were abandoned at the trial, *i.e.*, (1) no certificate of arrival, (2) no attachment.

The evidence produced at the trial shows that the affidavit and complaint were spurious, intended merely to set in motion Federal Civil Procedural Rules, in order to make use of pretrial proceedings. The whole scheme was designed to require petitioner to not only supply evidence from his own mouth to denaturalize him, but to aid the Government in another prosecution pending.

(b) The District Court was fully informed concerning the position of petitioner. Petitioner was given the choice between helping the Government to prove out of his own mouth certain charges made in a pending indictment, or claiming privilege.

(c) After petitioner claimed privilege and the District Court was informed of the claim and apprised of the background and reasons for the claim, the District Court ordered petitioner to answer over 100 questions. Many of these questions show on their face that they were designed to help the Government prove charges made in a pending indictment.

(d) Because of the insistence of petitioner that he was protected by the Fifth Amendment he was punished, not only by the imposition of a fine, but the courts below threw into the scale the refusal to answer, by holding that the Government had proved its case. In other words, the District Court punished petitioner because of his claim of privilege, by holding that the Government had a case, where in fact the Government was unable to prove its case. All of this because petitioner had not come forth and explained away the charges against him. This was all done in the face of petitioner's early assertion that the Government had no case. The trial demonstrated that the Government was unable to prove its case. The trial also revealed that the Government officials knew they had no case and expected to rely upon the Federal Rules of Civil Procedure to force petitioner to prove the case for them.*

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* In other words, we submit that the record discloses that the Government officials acted with bad faith. We direct the attention of Your Honors to **United States v. Zucca**, 351 U.S. 91; **United States v. Nowak**, ... U.S. ....., as support for our contention that the United States Attorney, in this and in various jurisdictions has manifested no regard for the rights of a naturalized citizen. The Government Officials resist every application of the spirit of the requirement of a proper affidavit. When we make the charge that the affidavit and complaint in the case at bar were in fact spurious, we fully realize that such charges should not be made without support in the record. We trust that our argument will point to the record sufficiently and that Your Honors will perceive the abuse practiced under the guise of compliance with prescribed rules. The Petition for Naturalization (Vol. I, p. 322; Vol. II, Exhibit No. 1, p. 1) shows a certificate of arrival. We fail to understand how anyone could possibly swear truthfully that he had looked at the files and found no certificate of arrival, unless he was careless. The real solution, we submit is that the officials merely go through a form designed to survive preliminary motions in order that the United States Attorney might invoke the Federal Rules of Civil Procedure.

(c) The reprisal in the case at bar amounts to a finding by the courts below that the Government had produced sufficient evidence when in fact it had not. The fact of the refusal of petitioner to testify was accepted as proof of a case, where otherwise no case existed.

2. When the Court of Appeals reversed the contempt sentence, did it not err in failing to consider further the effect of the error of the District Court in holding that petitioner had no right to the protection of the Fifth Amendment?

3. Can the Government proceed against a naturalized citizen with a design to revoke his certificate, without evidence, file the complaint, based upon falsehoods, and then put in motion the rules applicable to ordinary civil suits, in order to compel the citizen to either furnish evidence against himself or suffer reprisals?

4. What Congress meant by certain statutes and whether the Government has proved its case under them? The statute having been changed since this question was submitted under the previous law, the question now submitted is, what Congress means by the shift?

5. If thirty years after a federal court adjudged him entitled to be a citizen that judgment can be nullified and petitioner can be stripped of this most precious right, by nothing more than re-examination upon the merits of the very facts the judgment established?

6. When petitioner properly invoked the Fifth Amendment and refused to answer questions, did not the lower courts err in throwing this refusal into the scales against petitioner at his trial?

7. May the Court of Appeals disregard the findings of fact made below, try the case *de novo* and make findings of fact, not supported by evidence?

8. When it appears that the Court of Appeals regarded itself bound by the findings of the District Court in disregard of the rules promulgated by this Honorable Court, should not this Court invoke its supervisory powers?

9. When it appears that the District Court, with the approval of the Court of Appeals, has rendered a decree of denaturalization without adequate findings; when it appears that the District Court, with the approval of the Court of Appeals, has supported its decree with haphazard findings of fraud not proved and not properly pleaded; when it appears that the courts below have failed to distinguish between illegal procurement and fraud, and have failed to notice the change in legislation, should not this Honorable Court reverse and remand for the purpose of making adequate findings? Will this Honorable Court take a broader view in order to settle important questions pertaining to the status of all naturalized citizens?

10. Does not this case raise important issues in the proper administration of the law affecting naturalized citizens. Important issues are raised, which have not been, but should be settled by this Honorable Court. Some of these issues have been decided by the Court of Appeals in a way to conflict with applicable decisions of this Court. Has not the Court of Appeals so far departed from the usual course of judicial proceedings and sanctioned such departure on the part of the District Court, as to call for the power of supervision vested in this Court?

11. There was no evidence to show lack of jurisdiction on the part of the Naturalization Court. No evidence to show the kind of fraud which traditionaly vitiates judgments. So the question arises and is presented in this case,

can Congress constitutionally attach to the exercise of the judicial power, under Article III of the Constitution, authority in the District Court to re-examine a judgment of citizenship, after the judgment has become final by exhaustion of the appellate process or by failure to invoke it?*

12. Since 1790 Congress has conferred the function of admitting aliens to citizenship exclusively upon the courts. In exercising their authority under this mandate the federal courts are exercising the judicial power of the United States, conferred upon them by Article III of the Constitution. *Tutun* v. *United States*, 270 U.S. 568. For this reason it has been suggested (In *Schneiderman* v. *U.S.*, 320 U.S. 118, 124) that a decree of naturalization, even though the United States does not appear, cannot be compared (as was done in *Johannessen* v. *United States*, 225 U.S. 227, 238) to an administrative grant of letters patent for invention, and that the permissible area of re-examination is different in the two situations.**

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* This question was raised but not reached in **Schneiderman vs. United States**, 320 U.S. 118, 124: In the case at bar the evidence shows that the Government was represented at the hearing conducted by the Naturalization Court and that this representative consented to the award of citizenship. So in the case at bar, the Government now seeks to revoke a previous consent decree.

** This question was raised but not reached in **Schneiderman vs. United States**, 320 U.S. 118, 124. The case at bar again presents this question, which should be answered, if here reached, for the guidance of the federal courts exercising the judicial power of the United States. The question here presented includes a case wherein the Government is shown to have been represented at the hearing in the Naturalization Court. The evidence shows that the Government consented to the order admitting petitioner to citizenship.

13. The case at bar presents the question whether under the Act of 1952, in the absence of a proper claim of fraud, relying wholly upon a charge of illegal procurement, can the Government secure a *de novo* re-examination of the finding and judgment made by the Naturalization Court which Naturalization Court upon consideration of the petition, affidavits in support thereof and further testimony taken in open court, decided that petitioner was entitled to be admitted to citizenship, the Naturalization Court having found that petitioner had in all ways complied with the Naturalization laws.*

14. Should not the District Court, when requested, have determined whether the revocation was based upon a finding of illegal procurement or fraud, or both? If based upon illegal procurement, the District Court should have held that the Act of Congress in 1952 has taken jurisdiction on the ground of illegal procurement from the courts. If based on fraud, should not the District Court have found that the complaint failed to give support to such charge? Should not the District Court have found further that there was no evidence of the kind of fraud which traditionally vitiates judgments? The Court of Appeals was duly requested to clarify and answer these questions. The Court of Appeals having refused, should not this Honorable Court exercise its power of supervision, in order to put a halt to such a departure from the accepted and usual course of judicial proceedings?

15. Did not the Court of Appeals for the Seventh Circuit in the case at bar render a decision in conflict with a decision in *United States* v. *Stromberg*, 227 F. 2d 903, in

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*This question was raised under a previous Act but not reached in **Schneiderman vs. United States**, 320 U.S. 118, 124. The change in the statute makes it even more important that Your Honors clarify the problems of construction.

the Fifth Circuit on the matter of illegal procurement? The *Stromberg case* holds that illegal procurement is not a ground for denaturalization under §340(a) of the Immigration and Naturalization Act of 1952. The courts below in the case at bar appear to have endeavored to support the decree on the ground of illegal procurement. It is difficult to ascertain from the record made at the trial and the opinion rendered by the Court of Appeals, whether or not the courts below distinguished between fraud and illegal procurement. Should not this Honorable Court exercise its supervisory power, by requiring the courts below to be more specific, to consult *Minerich*, 250 F. 2d, 721 and to render a decision in conformity with the decisions of this Honorable Court?

16. Has not the Court of Appeals for the Seventh Circuit in the case at bar rendered a decision in conflict with the Court of Appeals for the First Circuit on the same matter in *Cufari* v. *U. S.*, 217 F. 2d 404. The District Judge in the case at bar said, (Vol. I, p. 335):

> "Stephen Dursich and Andrew Jordan, both long time employees of the Immigration and Naturalization service, who served on occasion as Designated Examiners, testified to the usual and customary mode of processing and examining applicants for citizenship. Their testimony to the effect that this petition of Paul De Lucia was processed in the customary way leads the court to the conclusion that this defendant had not disclosed to the Designated Examiner all the facts material to his application for citizinship and that such failure and misrepresentation foreclosed any further inquiry on the part of the Naturalization Office."

In the absence of any testimony as to what may have taken place before the Designated Examiner, MacKay, the District Judge looked to the testimony of the Examiners, who

were not present in order to guess what may have happened. In *Cufari* after stating that the Government offered to prove custom, which offer was rejected, Judge Woodbury said, p. 406:

> "The District Court rejected this offer of proof on two grounds. It said it was of the opinion that the evidence offered was legally insufficient to establish the Government's case by clear, unequivocal, and convincing evidence which does not leave the issue in doubt, and furthermore, that it would not find such evidence persuasive even though it were legally admissible."

We copy the footnote, p. 407:

> "Although we do not question the probative value in some situations of evidence of a person's habitual or customary conduct as showing the conduct of that person on a particular occasion (see 1 Wigmore on Evidence (3rd Ed. 1940) §§92, 93) we agree with the District Court's ruling excluding such evidence in the situation presented in this case. We therefore reject the Government's suggestion that in the event of our disagreement with the District Court's conclusion we should remand the case for a new trial in order that evidence of the custom and practice of the Examiners involved might be considered."

In the case at bar, the Court of Appeals refused to reject findings of the District Judge based upon proof of custom. This conflict in decisions, if permitted to stand will no doubt create confusion. In many pending cases the question no doubt will arise in the future.

After an order granting citizenship has been on the books for about 30 years, it is to be expected that the examiners may have passed on, or those surviving may not remember a particular applicant. In the case at bar, this Honorable Court is requested to decide if proof of custom should be permitted to take the place of evidence.

17. Has not the Court of Appeals for the Seventh Circuit, in the case at bar, rendered a decision in conflict with a decision on *res judicata* rendered by the District Court in *United States* v. *Kusche*, 56 F. Supp. 201.*

18. Does not the case at bar present an important question of procedure in denaturalization cases? Is it proper under the Federal Rules of Civil procedure to subject a defendant to the usual pre trial proceedings, to the end that if the defendant claims the protection of the Fifth Amendment, such claim shall be used against the defendant in the trial of the case, to such extent that the silence of the defendant may be held to take the place of evidence? In other words, can the Government prevail in a case where it has been unable to establish its case, by reliance upon the failure of the defendant to testify or produce evidence?

19. The case at bar presents a question not heretofore answered by Your Honors, except in principle. The answer is important to thousands of naturalized citizens. The question posed is:

> Can the Government proceed against a naturalized citizen with a design to revoke his certificate, with-

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* In a well reasoned opinion, Judge Hall demonstrates that to rely upon **Johannessen v. United States**, 225 U.S. 227, as did the Court of Appeals in the case at bar, is to decide a federal question in a way to conflict with the applicable decisions of this Honorable Court. We quote from Judge Hall, p. 223:

> "The **Schwinn case** (311 U.S. 616) destroyed whatever authority, if any, the **Johannessen** 1912, 225 U.S. 227 and **Mansour** cases 70 F. 671 were to the contrary."

We refer Your Honors to the opinion of Judge Hall, in order to properly appraise the authorities cited in the case at bar and in order to distinguish them, as not supporting the holding made in the Seventh Circuit.

out evidence, file the complaint, based upon falsehoods, and then put in motion the rules applicable to ordinary civil suits, in order to compel the citizen to either furnish evidence against himself or suffer reprisals!

IV.

Statute Involved.

Section 340(a) *of the Immigration and Naturalization Act of* 1952 (66 *Stat.* 260), 8 *U.S.C.* § 1451(a).

It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively * * *

V.

Summary Statement of the Matter Involved.

This is a denaturalization proceeding brought under Section 340 (a) of the Immigration and Nationality Act of 1952, 66 Stats. 163, 8 U.S.C.A. 1451. The District Court, after a hearing, entered a decree of denaturalization (Vol. I, p. 338). The entire trial court record was printed for use of the Court of Appeals, entitled Appendix Volume I.

All of the exhibits, consisting of papers, records and documents, were photostated and ordered up to the Court of Appeals. They have been sent here. All exhibits to be considered were printed, pursuant to the rules of the Court of Appeals, in Appendix Volume II. A narrative statement of the evidence was also furnished to the Court of Appeals (Vol. I, p. 343). It is important to note at the outset that the entire proceedings are to be submitted here because of the claim of petitioner that the Government has no case. The Government was proven to have been unable to support the decree.

Petitioner, Paul De Lucia, in 1928 was admitted to citizenship. It is important to observe the details of the record made in 1928, when DeLucia was adjudged a citizen, because of the defense made based upon estoppel and *res judicata*. The Naturalization Court order recites (Vol. II, p. 2) that the judgment was based upon a petition, affidavits in support and further testimony taken in open court. The certificate (Vol. II, p. 9; Vol. I, p. 324) recites that the Naturalization Court found that De Lucia had, in all respects, complied with the Naturalization Laws. Petitioner followed the requirements and prohibitions as to procedure. This compliance appears from the face of the record. (Vol. I, pp. 315-325; Vol. II, pp. 1-10) No evidence was introduced in the case at bar to suggest that De Lucia had not followed the requirements and prohibitions as to procedure or that the papers were not regular. Petitioner, as is shown by the record made at the time of naturalization, proved by the testimony of two witnesses, who in turn had the required qualifications, that these witnesses had in fact known the petitioner for the requisite probationary period. These two witnesses proved, according to the record made at the time, that petitioner possessed good moral character and was attached to the prin-

ciples of the Constitution., Compliance with the statute is shown as to the manner and time of proceeding. No question was raised in the evidence at this denaturalization hearing to indicate any claim that those things depending upon petitioner's assertions at the time of his naturalization were untrue. No fraud was shown, such as vitiates judgments. It was contended in the courts below and is again asserted here that the judgment of the Naturalization Court was a barrier to a mere re-examination upon the merits of the very facts the judgment established. If the decree is to find any basis in the evidence produced in the case at bar, it must consist of evidence *de hors* the record made in 1928.

Petitioner moved for Summary Judgment, which motion was also regarded as a motion to dismiss. (Vol. I, p. 11) The main foundation for the motion was that petitioner stood upon the validity of the judgment of the Naturalization Court. This motion was overruled. (Vol. I, p. 14) The defendant filed his answer (Vol. I, p 15) denying the allegations of the complaint. To this answer petitioner attached a note of explanation, to the effect that he declined to be a witness against himself. It is important to note procedure prior to trial. It is contended that abuse of the Federal Rules of Civil Procedure amounted to denial of due process. The Government made use of various motions preliminary to the trial.

(a) Motion to strike the answer.

(b) Motion to require petitioner to make certain admissions.

(c) Motion to require answers to questions put orally to petitioner before a Notary Public.

The District Judge filed a memorandum (Vol. I, p. 47) disposing of these motions. The motion (a) to strike and (b) that for admissions was ruled against the Government.

Petitioner was ordered to answer the questions (c) put to him before the Notary. The District Court refused to allow the privilege claimed under the Fifth Amendment. This ruling was held to have been in error by the Court of Appeals. (herein p. 85). Petitioner in his answer, with brief in support, to the motion of the Government, to have him committed for contempt explained his reasons for asserting his privilege. (Appendix to contempt proceedings, p. 21) When the Government moved to have petitioner punished for contempt, because of this refusal (c) the District Court postponed decision until after the trial.

Evidence was introduced by the Government intended to establish grounds for revocation. At the conclusion of this evidence petitioner rested. Petitioner elected to demurrer to the evidence produced by the Government.

A decree of Denaturalization was entered (Vol. I, p. 338). The District Judge filed a Memorandum (Vol. I, p. 325) designated as findings of fact and conclusions of law. The Decree entered by the District Court has been affirmed by the Court of Appeals, opinion appended hereto, p. 75.

After the disposition of the main case, the District Court adjudged petitioner in contempt of court. The contempt sentence was appealed. The Court of Appeals reversed. We have brought here the record made for the Court of Appeals in the contempt case. The record in the contempt case having been printed for use of the Court of Appeals we submit the printed copies herewith in an effort to acquaint Your Honors with the questions involved and here submitted. We append the opinion of the Court of Appeals in the contempt case, herein, p. 85. It will be observed that in his effort to have Judge LaBuy recognize the privilege, DeLucia filed an answer pointing out that DeLucia

was indicted in another federal case. (Appendix in Contempt case, p. 26). It was pointed out to Judge LaBuy that DeLucia had been asked over 100 questions and the manner in which the United States Attorney was endeavoring to use this pretrial proceeding in preparation of other prosecutions. With this background before Judge LaBuy, the District Court ordered DeLucia to answer all of the questions asked. DeLucia again asserted his privilege and was punished, not only by a fine, but the District Court went further and used the refusal to answer as if it were evidence against DeLucia.

An examination of the record in the case at bar will show that the Government filed a complaint alleging matters proved to be false at the trial, *i.e.*, the absence of a certificate of arrival and lack of attachment to the Constitution. (Vol. I, p. 5) These false statements, to be found also in the supporting affidavit (Vol. I, p. 8) gave the complaint the appearance of good cause. The complaint and affidavit were held to be sufficient to withstand the preliminary motions. (Vol. I, p. 14). During the trial these unfounded allegations were abandoned. The District Judge made no findings based upon these false charges. Nor did the District Judge find that these charges were unfounded. The findings of the District Judge rest largely upon general statements of fraud and as such are not supported by any proper allegations in the complaint.

The parties submitted briefs and argued the matter of *res judicata* and estoppel when the motion for summary judgment was presented. The District Court overruled the motion for summary judgment. (Vol. I, p. 14) The Government prevailed at this point, in part, because of the falsehoods in the complaint. These falsehoods pertained to jurisdictional matters, which if proved, might have supported a decree. The District Court in its mem-

orandum decision at the end of the case (Vol. I, p. 325) made no reference to the defense previously asserted based upon *res judicata* and estoppel. After hearing the evidence, the District Judge, by implication, overruled these defenses. The Court of Appeals specifically adjudged that the order of naturalization in 1928 was not *res judicata* of the issues presented in the denaturalization proceeding. (herein p. 81)

At the trial the Government undertook to prove that petitioner had been arrested and convicted of a felony in Italy, before his entry in this country. The proof failed completely. Although the Government introduced a large number of documents (Vol. II, pp. 12 to 43) intended to show that one Felice De Lucia had been so convicted, no effort was made to prove the law of Italy or the jurisdiction of the foreign courts. No evidence was produced to show that the Felice DeLucia named in these foreign documents was in fact petitioner. Judge LaBuy recognized this failure of proof and did not find that the Felice De Lucia named in the documents in fact was petitioner. Judge LaBuy did find as a fact that petitioner was Felice De Lucia. This conclusion was reached by circumstantially comparing the proven pedigree of petitioner in this country and comparing it with a parallel pedigree of one Felice De Lucia in Italy, *i.e.*, his birth certificate, his Italian family history. But Judge LaBuy did not attempt a further inference upon inference in order to conclude that the Felice De Lucia named in the so-called convictions was petitioner. The significance of the refusal of Judge LaBuy to take this step was ignored by the Court of Appeals.

The foundation of the Decree appears from the findings of the District Court to be the use of a name other than his own to enter this country. The District Judge recognized that it was necessary that the manner of entry should be

shown to have been material. So the District Judge followed the language of the complaint and held that concealments and misrepresentations concerning entry deceived the Examiners. It was found that these alleged concealments prevented full investigation and caused the Examiners to recommend citizenship. The complaint is based upon the claim that all of this amounted to a fraud upon the Naturalization Court (Vol I, p. 3). The District Judge found the existence of fraud in general terms. The claim made in the complaint was that the Naturalization Court relied upon the recommendation of the Examiner. The complaint alleged that the Naturalization Court was deceived because it too was prevented from looking into the previous history of petitioner, by reason of the recommendation made by the Examiner. There was a total failure of proof concerning the allegations and findings designed to make material the name used and previous convictions, if any.

Before the trial hearing was reached, Frank Meo, one of the original witnesses for petitioner had died. Michael Fish, the other witness was produced and testified, (Vol. I, p. 74). Mr. Fish was not asked anything about what may have happened when he appeared with petitioner before the Designated Examiner. Mr. Fish was not asked what may have happened in the Naturalization Court. Every time the courts below found a gap in the proof, the case was regarded as if petitioner were an alien resisting deportation, or an alien making application for citizenship. The burden in the courts below was placed upon petitioner. The courts below ignored the fact that the recitals to be found in the order for citizenship (Vol. II, p. 2) furnished a complete barrier to the theory upon which the revocation decree was founded. The decree was based upon the false assumption that the Naturalization Court depended en-

tirely upon the recommendation of the Designated Examiner. There was no proof to support this theory. There was no proof to show that both the Designated Examiner and the Naturalization Judge did not know all that which was proved in this trial, concerning the qualifications of the petitioner for citizenship. Insofar as the proof in the case at bar shows the Naturalization Court may very well have known a great deal more about petitioner than did Judge LaBuy. The courts below made haphazard findings of fraud with no basis in the evidence and with utter disregard of the limitations placed upon the Government by the allegations to be found in the complaint.

The District Judge, by implication, recognized that the Government was unable to prove its case without help to bolster it up by some sort of presumption. So the District Court said, (Vol. I, p. 334):

> "The defendant was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf. His failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain away the government's evidence."

When the Court of Appeals found in the contempt case, herein p. 85 that the District Court erred in the denial of the privilege, the Court of Appeals erred in refusing to notice that the District Court had thrown the refusal to answer into the scale against petitioner. All of this amounted to a penalty placed on petitioner because of his claim of privilege, a denial of due process.

VI.

Argument.

May it please the Court:

The abuse of the Federal Rules of Civil Procedure concerning pretrial practice carried on with the approval of the courts below calls for supervision and correction in this Honorable Court. The case at bar raises important questions as to the proper application of the Federal Rules of Civil Procedure.

We feel certain that a mere statement of the question should be sufficient to cause Your Honors to look further to see if our question arises from the records made below. Your Honors might compare that said by Mr. Justice Harlan in *Societe Internationale* v. *Rogers*, ... U.S. ..... It is obvious that Your Honors kept in mind the limitations placed upon rules of procedure by the Fifth Amendment and other guarantees of due process.

The advisory Committee on Rules made the following note concerning Rule 37, Federal Rules of Civil Procedure, Title 28, U.S.C.A., p. 138:

> "The provisions of this rule authorizing order establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co. v. Arkansas*, 1909, 212 U.S. 322, which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence and their unjustifiable use, as in *Hovey* v. *Elliott*, 1897, 167 U.S. 409, for the mere purpose of punishing for contempt."

In *Morrison* v. *California*, 291 U.S. 82, 88, Mr. Justice Cardoza said:

> "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities of knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

Although *Morrison* involved questions not involved here, we call attention to it for the reason that it points up our argument. In the case at bar, the prosecution shifted the burden in preliminary pretrial procedure and secured the help of the District Judge in the application of reprisals because of the claim by petitioner of his privilege.

We quote from the memorandum filed by the District Court (Vol. I, p. 48):

> "The second motion is to compel the defendant to answer oral interrogatories posed at this deposition and which he refused to answer on the ground that he did not want to be a witness against himself and declared the privilege of the Fifth Amendment. The court has considered the questions submitted to the defendant, and without going into extensive discussion concerning the nature of a suit for denaturalization, is of the opinion the defendant should be required to answer same. See *United States* v. *Costello*, (D.C.N.Y., 1954) 16 F.R.D. 428, aff'd (C.A. 2, 1955) 222 F. (2d) 656, cert. den., 350 U.S. 847; *United States* v. *Lustig*, (D.C.N.Y., 1954) 16 F.R.D. 138; *United States* v. *Jerome*, (D.C.N.Y., 1954) 16 F.R.D. 138."

Judge LaBuy failed to distinguish between the *Costello* case and the case at bar. One might read the opinion ren-

dered by the Court of Appeals in the contempt case, (here-in p. 85) without realization of the great difference between the *Costello* case and the case at bar. We respectfully submit that the power of supervision vested in this Honorable Court should prompt Your Honors to clarify the law upon the subject. Without such clarification, the opinions below will, no doubt, be used in furnishing prosecutors apparent authority to take advantage of naturalized citizens.

We respectfully submit that the contempt order helps to point up the manner in which the United States Attorney disregarded the rights given all naturalized citizens by Congress. The record shows that the Government officials started to build its case on what could be forced from petitioner. First with an administrative subpoena. Then the United States Attorney with a motion to strike the answer filed in the case at bar sought to compel petitioner to admit portions of the complaint in an answer. Then the Government filed interrogatories and took the position that the failure of petitioner to answer was binding as admissions. Then the United States Attorney sought oral answers in a deposition and obtained a rule to show cause. If the Government had had a case in the beginning, resort might not have been had to such procedure.

The law requires an affidavit showing good cause which means that the Government should be in possession of a good case before institution of this suit. The intent of Congress was to prevent what appears to have happened here, *i.e.* the institution of the suit and a search for the evidence afterwards.

When the defendant appeared in response to a notice he objected to being sworn. Although this is not a criminal proceeding it has been put in the same category. We re-

spectfully submit that the applicable rule has been stated in 16 C. J. S. §589 Constitutional Law, p. 1181 from which we quote:

> "As applied to a criminal prosecution, due process of law requires not only that accused after a plea of not guilty, shall not be put on his defense or deprived of his liberty until the state has produced evidence tending to prove that the crime charged has been committed and tending to connect accused with the commission thereof, but also that he shall not be convicted until the state has made out its case and removed the presumption of innocence by evidence establishing guilt beyond a reasonable doubt. * * * The due process provision of a constitution, whenever applicable, is a limitation in the enactment of statutory rules of evidence in criminal cases."

In the case at bar if we had nothing but the hundred questions asked by the prosecutor the District Court should have readily perceived the danger in which DeLucia has been placed by the Government. We have had the record in the contempt case certified here and have filed printed copies. It will be seen from this record that the District Court was duly informed from time to time of the position occupied by petitioner by reason of the procedure adopted.

The charge made by the Government included accusation of crime. It cannot be said that DeLucia is immune because of the passage of time. It would be easy to charge petitioner with a criminal conspiracy to enter this country unlawfully and to add to that charge that it was part of the conspiracy to keep him here as a citizen in order that he might assist the conspirators in the violation of other laws, concerning the importation of narcotics for instance.

The fact alone that the prosecutor chose to ask DeLucia about criminal charges made against relatives of DeLucia after DeLucia left Italy would be enough to cause DeLucia

to fear that the Government is working on some theory in order to bring DeLucia into a conspiracy with those relatives. Without some such theory the prosecutor could have had no legitimate interest in what the father and sister of DeLucia did after DeLucia left Italy.

The Government has a right to cancel citizenship but it must have a case to start with. Surely it has no right to start the suit and then fish for the evidence; no right to require the defendant to admit its case. Such practice violates due process of law. If petitioner could have answered questions and in some way limit his answers to this proceeding that would be one thing. But Your Honors know that his answers would probably have been used against him in criminal proceedings. Therefore the Fifth Amendment should be his protection if it means anything.

Under the Fifth Amendment to the Constitution a defendant in a "criminal case" cannot be compelled to be a witness against himself and need not take the stand to assert his privilege. *Bruno* v. *United States*, 308 U.S. 287; *Powell* v. *United States*, 226 F. 2d 269, 274 (App. D.C.); *cf. United States* v. *Scully*, 225 F. 2d 113, 115-116 (C. A. 2).

In contrast to the term "criminal prosecution" which appears in the Sixth Amendment guarantee of a jury trial, the Fifth Amendment's protection extends to "any criminal case."

Because the term "criminal case" in the Fifth Amendment is more inclusive than "criminal prosecution," the rule against requiring a defendant to be a witness against himself has been applied to defendants in various types of quasi-criminal proceedings. Where an action, though civil in form, is criminal in nature in that the conduct charged is criminal or the end sought is the imposition of a penalty or forfeiture, the privilege not to be a witness against him-

self is afforded to petitioner. As stated by Your Honors in *Boyd* v. *United States*, 116 U.S. 616, 634:

> "As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this *quasi* criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself * * *."

Following the *Boyd* doctrine, Your Honors, in a civil action to recover a penalty for illegal importation of contract labor, said:

> "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case the defendant cannot be compelled to be a witness against himself. * * * [citing *Boyd* v. *United States*, 116 U. S. 616] * * * within the rule there laid down, it was error to compel this defendant to give testimony in behalf of the government." *Lees* v. *United States*, 150 U. S. 476, 480.

This rule has been followed in the lower courts in suits to recover penalities under the Wool Products Labeling Act, *United States* v. *Fishman*, 15 F. R. D. 124, 151 (D. C. N. Y.) and in actions for penalties for violation of price controls. *Bowles* v. *Dueck*, 7 F. R. D. 335, Case 1 (D. C. N. Y.).

See also *Hope* v. *Burns*, 6 F. R. D. 356 (D. C. Ky.), where defendant's motion to dismiss interrogatories was granted in a case involving a suit for gambling losses permitted by a Kentucky statute.

See *National Discount Corp.* v. *Holzbaugh*, 13 F. R. D. 236 (D. C. Mich.). In a civil action for conspiracy to defraud, defendant's deposition was being taken and during the course of such taking the Grand Jury sitting elsewhere

returned a criminal indictment against him on the same subject matter. The court enjoined further investigation of the defendant and impounded the testimony already taken, saying (at 237):

> "To require the defendant * * * to submit himself to the plaintiff for further oral examination in this civil action, wherein, in the opinion of this Court, the fabric of the fraud is identical with the fraud embraced by the allegations contained in the criminal proceeding now pending against him * * * would be oppressive and, at least, an indirect invasion of his constitutional rights."

Similarly, in civil actions in state courts where the main thrust of the complaint is criminal in nature, the courts have upheld the right of the defendant to refuse to take the stand at all. Thus, in an action against an administrator of an estate charging him with embezzlement of estate funds, the court granted a writ of habeas corpus to the defendant who was arrested for ignoring a subpoena served upon him, saying:

> "He is not in the same situation as a witness in an ordinary civil suit, who, to claim his protection, must first be sworn as a witness and then when a question is propounded to him, that to answer would criminate or tend to criminate him, must so declare under oath and invoke the protection of the law. * * * [his] situation as a witness is analogous to that of a defendant in a criminal suit by indictment or information. He may or may not testify as he elects. When he refused to be sworn as a witness he exercised a constitutional right, and is entitled to his discharge under writ of habeas corpus." *In re Green*, 86 Mo. App. 216.

And in *State* v. *Smith*, 56 S.D. 238, 288 N.W. 240, 250, the Supreme Court of South Dakota stated:

> "A person may not be subjected to inquisition or called as a witness by the State in any judicial in-

quiry which has for its primary objective the determination of that person's guilt or innocence of a given offense. In such investigations that person is, in actual fact, a party as distinguished from a witness and his constitutional rights must be determined according to the facts, regardless of the form of the proceeding."

Some indication of the scope of the term "criminal case" is supplied by the fact that grand jury proceedings have been considered to be criminal cases for the purposes of the Fifth Amendment. See Gold, *Privilege Against Self-Incrimination in Federal Grand Jury Proceedings*, 24 Temple L. J. 395-408 (1951).

Persons already accused of crime under indictment or information should not be called before the grand jury. *United States* v. *Lawn*, 115 F. Supp. 674 (D.C.N.Y.); *Malloney* v. *United States*, 79 F. 2d 566, 578-579 (C.A. 1); *United States* v. *Miller*, 80 F. Supp. 979, 981 (D.C. Pa.).

Even when a witness has not been formally accused of a crime, if his activities are the subject of grand jury investigation, some courts have recognized his right not to be a witness. *People* v. *Gillette*, 126 App. Div. 665, 668, 111 N.Y.S. 133, 135, where the court said, "When he took the oath, he thereupon became a witness, and the constitutional provision is that he could not 'be compelled in any criminal case to be a witness for himself;' " *People* v. *Bermel*, 71 Misc. 356, 357, 128 N.Y.S. 524, 525, where the court said, "if he be in fact the party proceeded against, he cannot be subpoenaed and sworn, even though he claim no privilege." In both cases, perjury indictments, based on defendant's compelled testimony before grand juries, were dismissed. And compare *United States* v. *Monia*, 317 U.S. 424, 430, where an immunity statute was interpreted to afford immunity to witnesses before a grand jury whether they claimed the privilege or not.

While the rule that a witness before a grand jury which is primarily investigating his actions occupies the same status as one already indicted has not generally prevailed in the federal courts, *O'Connell v. United States*, 40 F. 2d 201, 205 (C.A. 2), the Court has taken cognizance of the distinction between an ordinary witness and one accused of crime. In *United States* v. *Scully*, 225 F. 2d 113, 116, the Court said:

> "Indeed one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a grand jury any person who is *de jure* or *de facto* an accused. The absence of appeals to this court involving the problem under discussion would seem to indicate that some such rule or practice is observed in the prosecutors' offices in this circuit."

And the constitutionality of such procedure has been questioned by the court in *Powell* v. *United States*, 206 F. 2d 269, 274:

> "No doubt it would be a boon to prosecutors if they could summon before a grand jury a person against whom an indictment is being sought and there interrogate him * * *. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure."

Where witnesses, not yet formally accused of crime, appear before investigating bodies and invoke the privilege as to all questions (including such items as age and residence) urging that the investigation is, in fact, directed against their personal activities as surely as if they were under indictment, the courts have been far more lenient than in the case of the ordinary contumacious witness. They have taken the view that it would be wrong to sustain a contempt conviction and idle to send the witness back to answer the few remotely relevant questions that can-

not be characterized as self-incriminating. *Maffie* v. *United States*, 209 F. 2d 225, 231 (C.A. 1). *Aiuppa* v. *United States*, 201 F. 2d 287 (C.A. 6); *United States* v. *Vadner*, 119 F. Supp. 330 (D.C. Pa.); *cf. Carlson* v. *United States*, 209 F. 2d 209 (C.A. 1).

It seems quite clear that there has been a growing judicial recognition that the liberal protections of the Fifth Amendment cannot be frustrated by semantic strictures.

The development is traced in detail in Judge Frank's dissenting opinion in *United States* v. *Grunewald*, 233 F. 2d 556. We quote from Judge Frank, p. 576:

> "No one who legitimately exercises the constitutional privilege ought to be so placed that he must subsequently justify it to a jury."

In the case at bar the District Judge tried the facts but that shouldn't change the principle. Judge Frank explained the manner in which Mr. Justice Harlan favored the same view in *United States* v. *Noto*, 226 F2 953, 954, 351 U.S. 902.

Whether the action is technically labeled civil or criminal or quasi-criminal, the root of the matter is that Fifth Amendment protection applies wherever the individual who is sought to be sworn as a witness against himself is in a situation like that of a criminal defendant.

We have shown that the term "criminal case" as used in the Fifth Amendment is not equivalent to criminal prosecution and that the courts have interpreted it to include various types of quasi-criminal proceedings.

Indeed, the Court of Appeals in *Minker*, 217 F. 2d 350 (C.A. 3), affirmed 350 U.S. 179, gave special recognition to the quasi-criminal nature of denaturalization, saying (at 352-353):

"Technically, we are not administering the criminal law in this case. But we are concerned with the administration of a sanction which in effect is gravely penal. A fine or imprisonment is the normal criminal penalty. But loss of citizenship is a far graver penalty than most fines and many prison sentences. The Supreme Court has recognized this by requiring a strictness of proof in denaturalization cases which approximates that imposed in criminal cases. Schneiderman v. United States, 1943, 320 U.S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796; Baumgartner v. United States, 1944, 322 U.S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525. And a court of appeals has recently held that the rule of strict construction of penal statutes applies to legislation of 'punitive impact' very much like denaturalization. Mangaoang v. Boyd, 9 Cir., 1953, 205 F. 2d 553. We think this is sound and salutary doctrine."

The Court of Appeals in holding that it was bound by the findings of fact made by the District Court failed to heed the admonishments of this Honorable Court.

The Court of Appeals failed to cite *United States* v. *Minerich*, 250 F. 2nd. 721, 726, wherein Judge Finnegan noted that decisions made in this Honorable Court require a different reading of the Federal Rules of Civil Procedure, Rule 52, 28 U.S.C.A. In the case at bar the Court of Appeals either accepted the findings of the District Court after giving them the force usually required by Rule 52, or the Court of Appeals, for some undisclosed reason, failed to notice that the findings were not supported by the evidence. The findings were insufficient to support the decree. After reading *Schneiderman* v. *United States*, 320 U.S. 118; *Baumgartner* v. *United States*, 322 U.S. 665; *Klapprott* v. *United States*, 328 U.S. 601 and *Knauer* v. *United States*, 328 U.S. 654, we are certain that Your

Honors will re-examine the record to determine if mistakes have been made. We quote from *United States* v. *Gypsum Co.*, 333 U.S. 364, 395:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In the case at bar we go further and contend that findings were made with absolutely no evidence to support them.

We respectfully suggest that first Your Honors should reject haphazard general findings, not based upon proper allegations to be found in the complaint.

In a denaturalization case, as in a criminal case, the Government is limited to the matters charged in the complaint. This Honorable Court will reject haphazard general findings made below.

Your Honors, speaking through Mr. Justice Murphy in *Schneiderman* v. *United States*, 320 U.S. 118, 160 said:

> "A denaturalization suit is not a criminal proceeding But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently we think the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint."

The only use of the word, fraud, to be found in the complaint, is in ¶ 8, (Vol. I, p. 5) to the effect that the Certificate of Arrival was obtained by means of false and fraudulent representations.

The District Judge made no finding based upon this charge. There was not a line of evidence to show any representation, true or false, made by petitioner to the officials who did issue the Certificate. District Judge Peirson M. Hall, S.D. California in *United States* v. *Kusche*,

56 F. Supp. 201, 230, has made a list of the steps required of an alien desiring to become a citizen. In the absence of proof to the contrary, it must be assumed in the case at bar that these steps were taken by petitioner.

The conclusion of law in the courts below was that the certificate was illegally and fraudulently procured. The findings are general. It is impossible to ascertain from them upon what underlying facts the District Court relied. It is impossible to determine upon what findings the Court of Appeals affirmed.

Mr. Justice Murphy said in *Schneiderman* v. *United States*, 320 U.S. 118, 130:

> "If it were not rendered unnecessary by the broad view we take of this case, we would be inclined to reverse and remand to the district court for the purpose of making adequate findings."

Your Honors, we respectfully submit, will find it impossible to determine upon what ground the Court of Appeals affirmed. No distinction was made by the District Court or the Court of Appeals between illegal procurement and fraud. No attention was paid in the courts below to the fact that Congress saw fit to change the law. Judge Finnegan, in *United States* v. *Minerich*, 250 F. 2nd 721, 730, recognized the problem:

> "Concealment of a material fact or * * * willful misrepresentation 'are the statutory alternative grounds authorizing revocation of an order admitting a person to citizenship. The question now arises on the words 'concealment' and 'material fact,' undefined in the current piece of legislation. There is a delusive exactness about those quoted words and their application here is heightened by the Congressional shift from the terms fraud and illegal procurement earlier laid down as the statutory basis for revocation. There

> are, of course, declarations and petitions filed by aliens in various stages of the naturalization process and without doubt such written documents were uppermost in the mind of the Congress when § 340 (a) was drafted. Providing for revocation when the certificate of naturalization is 'illegally procured' or obtained through 'fraud' present broader grounds than do either of the § 340 alternatives."

It will be noted that Mr. Justice Douglas concurring in *Schneiderman* v. *United States*, 320 U.S. 118, 161 said:

> "'Wrongful conduct'—like the statutory words 'fraud' or 'illegally procured'—are strong words. Fraud connotes perjury, concealment, falsification, misrepresentation or the like. But a certificate is illegally, as distinguished from fraudulently procured when it is obtained without compliance with a 'condition precedent to the authority of the Court to grant a petition for naturalization.'" *Maney* v. *United States*, 278 U.S. 17, 22.

In *Nowak* v. *United States*, ... U.S. ..... it will be noted that Mr. Justice Harlan kept the following classifications separate *i.e.*,

2. *Fraudulent Procurement.*
3. *Illegal Procurement.*

In *Schneiderman* v. *United States*, 320 U.S. 118, 176, Mr. Chief Justice Stone, dissenting referred to *Schwin* v. *United States*, 311 U.S. 616, where

> "We held, without dissent, 311 U.S. 616, 'that the certificate of citizenship was illegally procured,' and for that reason we affirmed a judgment cancelling it."

In a footnote entered by Chief Justice Stone we find:

> "The district court's decision was based on both fraud and illegality. The circuit court of appeals relied upon fraud alone, 112 F. 2d. 74, but our affirmance was rested 'on the sole ground' of illegality."

Mr. Chief Justice Stone said further, p. 177:

> "The purpose of § 15—like that of § 11, which authorizes the Government to appear in a naturalization proceeding to contest the application—is not merely to insure the formal regularity of the proceeding, but to protect the United States from the injury which would result from the acceptance as citizens of any who are not lawfully entitled to become citizens."

Your Honors will notice that Mr. Chief Justice Stone several times made reference to the five year probationary period. We respectfully suggest that if the Honorable members of this Court had been confronted with a case such as that at bar, where the alleged misconduct occurred, if at all, years previous to the probationary period, there would have been no dissent. Mr. Justice Murphy in *Schneiderman v. United States*, 320 118, 121 noted that the complaint charged that the certificate had been illegally procured, in that during the probationary period, Schneiderman had not behaved. Your Honors might search the complaint in the case at bar in vain for any charge based upon misbehaviour during the five year period. Mr. Justice Murphy said p. 122:

> "The Government proceeds here not upon the charge of fraud but upon the charge of illegal procurement."

The courts below failed to distinguish between illegal procurement and fraud. Further study may have shown that neither existed.

The order of naturalization entered in 1928 is res judicata. The Government is estopped and the District Court was without jurisdiction to denaturalize petitioner on the grounds said by Judge La Buy to support the decree.

The certificate, (Vol. I, p. 324; Vol. II Ex. 5, p. 9) recites that the Court found that Paul DeLucia had in all respects

complied with the naturalization laws of the United States and that he was entitled to be admitted and it was thereupon ordered by the said Court that he be admitted as a citizen of the United States of America. We submit that these recitals are binding on all concerned and this should be the end of the case.

The judgment of naturalization constitutes a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization. *Chicot County Dist. v. Bank*, 308 U.S. 371, 378; *United States* v. *Throckmorton*, 398, U.S. 61; *United States* v. *Richmond*, 17 F. 2d. 28. Whether a person is of good moral character is a fact which is shown by his behavior proved in naturalization proceeding and settled by judgment of naturalization. *United States* v. *Kusche*, 56 F. Supp. 201. We quote from the opinion of the Court of Appeals, herein p. 80:

> "It seems that De Lucia in this court contends that he cannot be denaturalized because the order of naturalization entered in 1928 is *res judicata*. He supports his contention by citing some of the syllabi from *United States* v. *Kusche*, 56 F. Supp. 201. This effort has brought forth from government counsel this opus:
>
> > 'Res Judicata, as a defense in these proceedings, literally has been killed by drowning under the inundation of decisions released first in *Johannessen* v. *United States*, 225 U.S. 227, for fraudulent procurement, in *United States* v. *Ness*, 245 U.S. 319, and in *Maney* v. *United States*, 278 U.S. 17 and *United States* v. *Ginsberg*, 243 U.S. 472, for illegal procurement of citizenship. Wilful misrepresentation and concealment of material facts in these cases have only opened the judicial floodgates wider and killed the defense deader. * * * Surely the defense here has been thoroughly necrotized.'

"More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was illegally and fraudulently procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding."

We find nothing in the opinion rendered by Judge La Buy (Vol. I, pp. 325 to 336) to show that the District Court ruled specifically on the matter of *res judicata*. No doubt Judge La Buy considered that this defense had been disposed of when the District Court overruled (Vol. I, p. 14) the motion for Summary Judgment (Vol. I, p. 11). At any rate, the question is here presented to this Honorable Court. Mr. Justice Douglas speaking for this Honorable Court in *Knauer* v. *United States*, 328 U.S. 654, 670, said:

"II. It is said, however, that the issue of fraud may not be tried in this case. An analogy is sought to be drawn to those cases where relief against a prior judgment on the ground that perjured testimony was introduced at the trial, was denied. *United States* v. *Throckmorton*, 98 U.S. 61, 66. And see *Toledo Scale Co.* v. *Computing Scale Co.*, 261, U.S. 399, 421. But that rule goes no further than to say that the issue of fraud can become *res judicata* in the judgment sought to be set aside. We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of naturalization. Those facts relate to the past-to behavior and conduct. But the oath is in a different category. It relates to a state of mind and is a promise of future conduct. It is the final act by which an alien acquires the status of citizen. It requires forswearing of allegiance in good faith and with no mental reservations. The oath being the final step, no evidence is heard at that time. It comes after the matters in issue have been resolved in favor of the applicant for citi-

zenship. Hence, no opportunity exists for the examiner or the judge to determine if what the new citizen swore was true, was in fact false. Hence, the issue of fraud in the oath cannot become *res judicata* in the decree sought to be set aside. For fraud in the oath was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated.

Moreover, when an alien takes the oath with reservations or does not in good faith forswear loyalty and allegiance to the old country, the decree of naturalization is obtained by deceit. The proceeding itself is then founded on fraud. A fraud is perpetrated on the naturalization court."

In a footnote Mr. Justice Douglas said:

9. At the time of Knauer's naturalization the Act provided:

"No alien shall be admitted to citizenship unless (1) immediately preceding that date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this subdivision he had behaved as a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. At the hearing of the petition, residence in the county where the petitioner resides at the time of filing his petition, and the other qualifications required by this subdivision during such residence, shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required by this Act to be included in the petition.' §6(b) of the Act of March 2, 1929, 45 Stat. 1512, 1513-1514 which replaced §4, subdivision Fourth, a similar provision of the Act of June 29, 1906, 34 Stat. 596, 598."

We repeat from that said above by Mr. Justice Douglas, p. 670:

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization."

So Mr. Justice Douglas made it plain that Your Honors did not in *Knauer* find it necessary to decide the question now presented in the case at bar. In the case at bar the Court of Appeals avoided a direct answer to the question in the following which we again quote:

> "More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was illegally and fraudulently procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding."

Your Honors will note from the above quotation that the Court of Appeals followed the language of Section 340(a), which statute has been changed since *Knauer*. Section 340(a) provided for cancellation.

> "* * * on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by wilful misrepresentation. * * *"

in order to further demonstrate how careful Your Honors were to keep *Knauer* within the limits of the question there presented, we quote further from Mr. Justice Douglas, p. 671:

> "We have recently considered the broad power of equity to set aside a decree for fraud practiced on the court which granted it. *Hazel-Atlas Co. Hartford Co.*, 322 U.S. 238. The present suit is an equity suit. *Luria v. United States*, 231 U. S. 9, 27-28. But we need not

consider in this case what the historic powers of equity might be in this situation. For Congress has provided that fraud is a basis for cancellation of certificates of naturalization in proceedings instituted by the United States."

p. 673:

"We do not have here a case where, after an alien has been naturalized Congress provides new grounds which are invoked for cancellation of his certificate.

* * *

"Moreover, we are not faced with the question of what limits there may be to conditions for denaturalization which Congress may provide. A certificate obtained by fraud is clearly within the reach of congressional power."

p. 674:

"Since fraud in the oath of allegiance which Knauer took is sufficient to sustain the judgment below, we do not reach the other questions which have been argued."

The reason we respectfully point out the limitations above placed by Your Honors upon the duty of this Honorable Court is that the case at bar presents the necessity of decision of some of the questions not reached in *Knauer*. One reason we have for quoting at such great length from *Knauer* is that we believe we find an implication that the questions submitted in the case at bar should be regarded as having been settled under *res judicata*.

Our questions require an understanding of the real basis of the decree entered by Judge La Buy. With all due respect to the Court of Appeals the answers are not given by a mere repitition of the language of §340(a).

In view of the determination in previous cases decided by this Honorable Court that Your Honors will re-examine the

findings made below, we respectfully direct Your Honors to the following questions which arise on this record.

(a) What concealments were made?

(b) What misrepresentations were made?

(c) To whom were they made?

(d) How did their making result in the entry of the order of naturalization?

(e) If all of this resulted in illegal procurement has not that ground been removed by Congress?

(f) If all of this amounts to fraudulent procurement

(1) Was the fraud such that traditionally vitiates judgments?

(2) If not such fraud is it within the reach of the statute?

(3) Do we have here a case where after an alien has been naturalized Congress has provided new grounds which are here invoked for cancellation of his certificate?

(4) What limits may there be to conditions for denaturalization which Congress may provide?

(5) To what extent do these haphazard findings of fraud really mean that the courts below gave the Government a trial *de novo* on issues of fact, the establishment of which Congress has made conditions precedent to naturalization?

(6) Was any fraud perpetrated on the Naturalization Court?

(7) If there be any issue of fraud perpetrated on the Naturalization Court, did not that issue become *res judicata* in the judgment sought to be set aside?

(8) Must not the act of admission be taken as final for any cause which may have existed at that time?

(9) If the act of admission be not taken as final, was it not the duty of the courts below to have made a clear and unequivocal statement of the grounds of revocation, not mere legal phrases?

(10) Should not all of these questions have been answered below?

After it is perceived by Your Honors that the case at bar raises important questions it should be an easy matter to demonstrate that the authorities cited by the Government on the subject of *res judicata* are of not much help.

Johannessen v. United States, 225 U.S. 227.

The certificate was based upon the perjured testimony of two witnesses that Johannessen had resided for the required period in the United States. If he could not meet this requirement the Naturalization Court had no jurisdiction so *United States v. Throckmorton*, 98 U.S. 61 did not apply. In the case at bar there is no finding of fact to be compared with *Johannessen* to attack the jurisdiction of the Naturalization Court.

United States v. Ness, 245 U.S. 319.

> "The filing of a certificate of arrival, as provided in §4, subdivision 2, of the Naturalization Act, is an essential prerequisite to a valid order of naturalization."

Ness admitted his failure to attach a certificate of arrival. Mr. Justice Brandeis said, p. 322:

> "It is urged that the certificate of arrival is merely a form of proof which the naturalization court has power to dispense with for cause. The uses served by the certificate, the history of the provision and its relation to other parts of the act show that this contention is unsound."

In the case at bar the complaint alleges (Vol. I, p. 5) that petitioner failed to attach a certificate of arrival. The Government proved this allegation to be false. (Vol. I, p. 322, Vol. II, p. 1)

The *Ness* case is of no value as a precedent in the case at bar aside from the fact that §340(a) is the result of a change on the part of Congress.

Maney v. *United States*, 278 U.S. 47.

No certificate of arrival was attached to the petition. Mr. Justice Holmes said, p. 22:

> "We are of opinion that the Circuit Court of Appeals was right in holding that the filing with the petition of the certificate of arrival was a condition attached to the power of the court."

The *Maney* case is not in point so there is no need to notice further differences.

United States v. *Ginsberg*, 243 U.S. 472.

Questions had been certified to this Honorable Court by the Court of Appeals. Citizenship had been irregularly granted after a hearing in chambers. Petitioner was not qualified by residence. No such questions were presented in the case at bar.

We believe it will be helpful for Your Honors to examine a case carefully decided by District Judges in New York. In *Petition of Field*, 117 F. Supp. 154 it appears that Mrs. Field had been granted citizenship and the Government moved under F.R. Civ. P. 60(b) 28 U.S.C.A. for an order to vacate. Judge Sugarman vacated and thereby put Mrs. Field back into the status of an alien making application for citizenship. Later the petition for naturalization was granted in *In re Field's Petition*, 159 F. Supp. 144 by Judge Dawson. We quote p. 146:

"The Immigration and Naturalization Service opposes the granting of citizenship to petitioner on the ground that petitioner obtained her immigration visa by a material misrepresentation, willfully and knowingly made, and that therefore the immigration visa was obtained by fraud, and admission of petitioner into the United States in possession of a visa so obtained is not a lawful admission for permanent residence, and hence she is ineligible for naturalization. The issue as presented is, therefore, primarily whether the petitioner has been lawfully admitted to the United States for permanent residence."

The importance of calling the attention of Your Honors to the *Field* case is that there the Government, as it should, recognized that entry into this country was a matter to be submitted to the jurisdiction of the District Court. We copy from the opinion of Judge Dawson p. 147:

(1, 2) The Court recognizes that there is an apparent disagreement among the courts as to whether a willful visa misrepresentation is always a material fraud where it may have the effect of hindering investigation of the applicant, or whether there must be a showing that the facts, if revealed, would have led to a denial of the visa. Cf. *Duran Garcia* v. *Neelly*, 5 Cir., 1957 F. 2d 287; *Landon* v. *Clarke*, 1 Cir., 1957 239 F. 2d 631; *Corrado* v. *United States*, 6 Cir., 1955, 227 F. 2d 780, certiorari denied 1956, 351 U.S. 925, 76 S. Ct. 781, 100 Ed. 1455, with *United States ex rel. Iorio* v. *Day*, *supra*; *Herrera-Roca* v. *Barber*, D.C. N.D. Cal. 1957, F. Supp. 492. This court finds that the rule of this circuit, which appears to be the most appropriate rule, is that not any misrepresentation warrants a finding of fraud or materiality, but that there must be a showing that the misrepresentation concealed facts which "might well have prompted a final refusal" of the visa, or "might have resulted in a proper refusal of the visa." *United States ex rel. Jankowski* v. *Shaughnessy*, 2 Cir., 1951, 186 F.

> 2d 580, 582; *United States* v. *Flores-Rodriguez*, 2 Cir., 1956, 237 F. 2d 405, 408. Such a showing may appear by the falsity in the visa application itself, as for example, where the applicant falsely denies ever having been convicted of a crime involving moral turpitude, but where the non-disclosure is of the nature shown in this case there must be a further showing of facts which would allow the Court to conclude that the misrepresentation was material."

It must be remembered that Judge Dawson was considering the problem presented to a Naturalization Judge at the time of application for citizenship. All of this confirms the soundness of our position here that the problem concerning the entry of DeLucia was one resolved by the Naturalization Court. Judge Dawson said, p. 148:

> "The Court therefore concludes that petitioner has been legally admitted to this country for permanent residence and is eligible for naturalization. No other issue has been raised for denying the naturalization of petitioner and the Court finds that she has satisfied the requirements for naturalization. The oath of naturalization shall be administered to the petitioner. So ordered."

Our argument in the case at bar can be understood if Your Honors will imagine the position or status to be occupied by Mrs. Field if the Government should prevail upon denaturalization proceedings and the courts below should indulge in haphazard findings of fraud, failing to recognize the validity of the judgment entered by Judge Dawson.

We examine the findings of fact as made by the District Court in the order they appear in the opinion rendered by Judge LaBuy (Vol. I, pp. 325 to 336). We endeavor to trace the findings of the District Court into that said by the Court of Appeals in each instance.

Findings made by the District Court concerning matters not in dispute might very well have confused the issue in the Court of Appeals.

It will be noted that Judge LaBuy said (Vol. I, p. 336):

> "This memorandum shall constitute the Findings of Fact and Conclusions of Law."

First the District Judge made a finding of fact not disputed. A fact previously admitted. Judge LaBuy said (Vol. I, p. 326):

> "The first basic issue which the government must prove is that this defendant, Paul DeLucia, is the same Paul DeLucia who was granted a Certificate of Naturalization in September 1928."

Then after a review of much evidence, Judge La Buy said (Vol. I p. 328):

> "It is the court's conclusion that this evidence clearly established that this defendant is the Paul DeLucia to whom a certificate of Naturalization was granted September 27, 1928; and that this defendant, Paul DeLucia, used the name Paul Maglio when he entered this country and when he applied for a certificate of Naturalization."

No harm comes to petitioner from all of this, if the reader of the memorandum is familiar with the record. Without the record one might conclude that this carefully documented finding was made necessary by a dispute over the facts here found. DeLucia announced in the beginning, (Vol. I p. 15) that his defense was based upon the claimed validity of the judgment of the Naturalization Court. Such claim could not have been made if any contest had been suggested as to whether petitioner was the same person who was granted the certificate. The defense of petitioner all through the case has been based upon the validity of the certificate.

The District Judge treated the matter of the name used by petitioner when he applied for naturalization as if it were a basic issue. As a matter of law, the name used was immaterial.

We quote further from Judge La Buy (Vol. I, p. 328):

> "The next basic issue which the government must prove is that this defendant falsely assumed the name of Paul Maglio when he applied for his naturalization."

Then after reference to the evidence, Judge La Buy has stated (Vol. I, p. 329):

> "The court is of the opinion that the government has conclusively shown that the defendant, Paul DeLucia was not Paul Maglio, born July 10, 1898 in Apricena, Italy; that he falsely assumed the name of Paul Maglio to enter this country; that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and thereby committed a fraud on the court."

There are to be found a number of conclusions here. In order to examine them we must repeat them separately. It may prove confusing to lump them together, as did Judge La Buy. The District Court covered three important steps here, *i.e.*,

(a) entry to this country
(b) preliminary papers
(c) fraud on the Naturalization Court.

If your Honors will keep these steps separate it will be helpful in disclosing here that the courts below failed to understand the force of the judgment of the Naturalization Court.

The Court of Appeals said, (herein p. 80):

> "The use by an alien of an assumed name to gain entry into the United States, is ground for deporta-

tion. *Landon* v. *Clarke*, 239 F 2d. 631, unless satisfactorily explained: *United States* v. *Schlofeldt*, 94 F. 2d 263. No attempt to explain such use is made in this case. Such use, in attaining citizenship, by naturalization is sufficient ground for revocation thereof, inasmuch as concealment of one's true name is an effective impediment to an investigation or inquiry relative to the person involved. Had DeLucia used his own name at all relevant times, a path of inquiry leading to his criminal record would have been opened to the government."

Your Honors will note that cases such as *Landon* v. *Clarke*, 239 F. 2d 632 involving deportation of an alien are to be distinguished from the case at bar. The alien in such case has the burden of proof as to entry. Mr. Justice Murphy said in *Schneiderman* v. *United States*, 320 U.S. 118, 122:

> "This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant. Instead the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from that status."

The courts below paid no heed to that said by Your Honors and continued to cite cases involving deportation and naturalization cases as authority for revocation. The courts below overlooked the difference in where rested the burden of proof. This may at first be difficult to believe, but the opinions rendered below stand as evidence of such a blunder on such a simple matter of law.

The courts below flew into the face of the uncontradicted evidence in assuming that:

> "No attempt to explain such use is made in this case."

The evidence leaves a void as to what explanation DeLucia may have made to the officials who issued the papers and passed him into this country. The evidence leaves a void as to what explanation DeLucia gave to Examiner Durish (Vol. I, p. 86). Durish did not remember the conversation. He could tell from his marks on the Exhibits that the subject of the use of more than one name was brought under discussion. The same discussion may have taken place between McKay and DeLucia. The record is void as to what explanation may have been given at this point.

As was said by Judge Levin in *United States* v. *Meli*, 158 F. Supp. 217, 220:

> "Hypothetical interpretations of nebulous symbols recorded twenty-eight years ago are not to be considered as clear, unequivocal, and convincing evidence which does not leave the issue in doubt."

The testimony leaves a void as to what explanation DeLucia may have given to the Naturalization Judge. The courts below do not make it clear as to when DeLucia was required to explain. If the requirement was to the Immigration Service, there is no evidence that DeLucia did not explain.

We again quote from Judge Finnegan in *United States* v. *Minerich*, 250 F. 2d 721, 731:

> "Silence at the time of naturalization is the basis here for seeking forfeiture of Minerich's citizenship. There is no evidence, whatever, that he did anything to prevent inquiry, or to elude investigation, mislead or hinder the officials charged with duties under the naturalization Act."

The circumstances in *Minerich* are different from those in the case at bar, but it is worthy of note that Judge

Finnegan had studied the record. Judge Finnegan did not cast the burden on Minerich every time a gap was found in the evidence. When the courts below made reference to the failure of DeLucia to testify at his trial in the District Court, another question was raised. The Court of Appeals said, we repeat, herein p. 80:

> "Had DeLucia used his own name at all relevant times, a path of inquiry leading to his criminal record would have been opened to the government."

There is no evidence that De Lucia did not use his own name at all relevant times. His name at the time of entry was Paul Maglio. That was his name up to the time it was legally changed by the Naturalization Court. Judge LaBuy found that in Italy his name was Felice DeLucia, but without further findings, such fact was immaterial. Here again Your Honors will note that the path of inquiry had been opened. *Cf. In re Iwanenkos Petition*, 145 F. Supp. 838.

There is no evidence concerning what the Immigration Officials may have learned. What we do know for certain is that the Naturalization Court had before it the conduct of De Lucia during his probationary period and that that Court decided the matter in favor of citizenship.

Perjury must be false swearing as to a matter material. The name used does not appear to be material. Judge LaBuy must have realized that the use of a name alone would have been immaterial, so Judge LaBuy coupled such use with a finding that the use of a name prevented investigation into eligibility. There was no prevention or interference shown. The courts below ignored the absence of evidence concerning prevention or interference. Every step taken by De Lucia on his way to citizenship was fully investigated, insofar as is shown by the evidence.

Petitioner was eligible for citizenship and was found to have been eligible by the Naturalization Court.

Judge LaBuy concluded (p. 333):

> "The court is of the opinion that the foregoing evidence clearly established that Paul DeLucia and Felice DeLucia are one and the same person."

Your Honors will please note that Judge LaBuy refused to go any further than to find that the DeLucia on trial was in fact Felice DeLucia. Petitioner had a perfect right to sit by as the Government introduced a large number of exhibits, (Vol. II, pp. 12 to 43) intended to show that one Felice DeLucia had been convicted in Italy. This evidence at a future time during the trial may have been connected up by proof that the Felice DeLucia named in the foreign documents was in fact petitioner. This connection was not made. So the introduction of the foreign documents was harmless and should have been so held. We quote from *McCaskill Co. v. United States*, 216 U.S. 504, 517:

> "In other words, if the testimony was not followed up by other testimony which was necessary to give it effect, we may assume that the court below gave to it no value or probative strength. It must be kept in mind that the case was tried by the court."

The District Judge in the case at bar must have noticed that the connecting evidence never came. Judge LaBuy made no finding based upon the claim asserted by the Government that petitioner and Felice DeLucia named in the foreign documents were the same.

The Court of Appeals improperly added to the findings of the District Court. In so doing, the Court of Appeals exceeded its appellate jurisdiction. The Court of Appeals is not a fact finding body.

The Court of Appeals repeated the finding of Judge LaBuy (herein p. 79):

> "(6) that the evidence clearly established that Paul DeLucia and Felice DeLucia are one and the same person."

As we have said it will be noted by Your Honors that in the case at bar, the Government introduced a number of foreign documents, i.e., Exhibits Nos. 28, 36, 37, 38 and 39 (Vol. II, pp. 12 to 42) purporting to show conviction of one Felice DeLucia for homicide in Italy. Judge LaBuy did not find that the Felice DeLucia in these documents was the person on trial. It is assumed that Judge LaBuy recognized the rule of law that one inference could not be built upon another. The point had been made before Judge LaBuy that there had been no proof of the jurisdiction of the foreign court. No evidence was introduced concerning the law of Italy. Exhibit 38 (Vol. II, p. 26) reveals a conviction had against Felice DeLucia on July 23, 1954. Paul DeLucia landed on these shores August 20, 1920 and has been here since. The Felice DeLucia named in the foreign document purporting to show convictions was not proved to be the person on trial. At any rate, Judge LaBuy decided to not find that the person on trial is the same person named in those foreign documents. Judge LaBuy did say (p. 335):

> "The court holds that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate granted to him."

The Court of Appeals said (herein p. 79):

> "While the court did not expressly indicate what it meant by the words 'the concealment of other material facts' it is apparent to us from the context of the memorandum that the court had in mind DeLucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum."

We respectfully submit to Your Honors that if Judge LaBuy had made the finding of fact said by the Court of Appeals it would have been like this:

> "DeLucia's failure to reveal his convictions for homicides in Italy prior to coming to this country vitiates the certificate of citizenship."

Such a finding would have been deficient, as there has been no previous finding that the Paul DeLucia on trial had been previously convicted. The finding would have been deficient also because of its omission of further elements. It does not specify to whom DeLucia failed to make revelation. Now that the Court of Appeals has made the above additional finding, we request Your Honors to look to the record in order to see that if Judge LaBuy had made it, it could not possibly meet approval. In other words, the Court of Appeals stretched the findings of the District Judge beyond the point where Judge LaBuy was willing to venture. In this manner the Court of Appeals has made findings, contradicted by the evidence and unsound as a matter of law.

Your Honors will note that the Court of Appeals in finding that DeLucia failed to reveal convictions, the Court of Appeals neglected to find just where the faiture took place. If in the preliminary papers or in the various interviews with Examiners there is no evidence of failure to reveal. If before the Naturalization Court, the Government left a

wide gap in its evidence. This, we submit, constitutes haphazard findings.

We quote from *Penna R. Co.* v. *Chamberlain*, 288 U.S. 333, 340:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the case of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

It is respectfully submitted in the case at bar that the courts below persisted in assuming facts shown to not have existed. In the case at bar, facts were shown to have not existed by the record made in 1928. No question of credibility of witnesses was involved. Your Honors can see from the record made in 1928 that certain facts existed. Such established facts preclude the inferences made by the courts below.

Mr. Justice Murphy said in *Schneiderman* v. *United States*, 320 U.S. 118, 122:

> "This does not mean that once granted to an alien, citizenship cannot be revoked or cancelled on legal grounds under appropriate proof. So, whatever may be the rule in a naturalization proceeding (See *United States* v. *Manzi*, 276 U.S. 463, 467), in an action instituted under §15 for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen.

In the case at bar we present the opposite. The Court of Appeals when it observed that the findings made in the District Court were unclear and ambiguous construed them against the citizen.

The failure upon the part of the Court of Appeals to re-examine the evidence to determine if the findings of Judge LaBuy were based upon the evidence caused the Court of Appeals to overlook the significance of the refusal of Judge LaBuy to find certain facts.

The complaint alleges (Appendix Vol. I, p. 4) that in his preliminary form (shown in the record as Government Exhibit No. 2, Vol. II, p. 3) petitioner alleged under oath that he had never been arrested. The complaint alleges further (p. 5):

> "IV. That in truth and in fact the defendant has been arrested and convicted for voluntary homicide under his true name of Felice DeLucia on May 18, 1917, at Naples, Italy."

The complaint alleges (pp. 5, 16) that upon the false representation that he had never been arrested the Service issued a Certificate of Arrival. That the concealments were made in the proceedings leading to his Naturalization to deceive the examiners and to conceal his lack of good moral character and lack of attachment, to induce the Service to recommend that his petition be granted and to preclude inquiry by the court concerning his qualifications.

In his opening statement, Mr. Bickley, the Assistant United States Attorney, said (Vol. I, p. 67) that the Government would show that petitioner concealed his prior arrests and convictions and sentences.

Yet Judge LaBuy did not find that petitioner had been arrested and convicted in Italy. Nor did Judge LaBuy find that, assuming that DeLucia had been arrested and convicted in Italy, that these facts had been concealed from the examiners, or from the Naturalization Court. Judge LaBuy could not have found without error that these matters were concealed from the Naturalization Court, in

the absence of evidence concerning what was heard on the subject by the Naturalization Court. Such finding would have been impotent in the face of the judgment. A finding by Judge LaBuy that petitioner did not reveal his arrests and convictions, assuming that there were such, could not have been made upon the evidence without error. The Examiners did not claim to remember the answers made by petitioner when he was questioned as to what petitioner meant when petitioner gave a negative answer to the question about arrests. We assume that Judge LaBuy refused to make findings of fact to fit the theory of the Government, as to alleged arrests and convictions in Italy, because of failure of proof. The Court of Appeals, held as we have said, in the absence of corresponding findings by Judge LaBuy, (herein p. 79):

> "While the court did not expressly indicate what it meant by the words 'the concealment of other material facts', it is apparent to us from the context of the memorandum that the court had in mind DeLucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum."

Again we say that if Judge LaBuy had made the finding, above quoted and added by the Court of Appeals, it would become the duty of Your Honors to re-examine the record to determine if any such finding was warranted.

The District Court announced a conclusion of law not applicable to the case at bar.

The courts below failed to distinguish between cases falling into the following catagories.

(1) Applications for citizenship.
(2) Revocation of citizenship.
(3) Deportation of aliens.

We next examine findings made by Judge LaBuy which may be classified as Conclusions of Law, or propositions of law mixed with assumptions of fact. We quote from Judge LaBuy (p. 333):

> "The use of an assumed name to gain entry into the United States, or such use in the filing of a Declaration of Intention has been held sufficient grounds for revocation of a naturalization certificate, unless it is shown that this name had been one assumed and used prior to entry into the United States."

We are not informed by the opinion of Judge LaBuy specifically as to how the above proposition was applied to the issues in the case at bar.

For the purpose of argument, if we assume that Judge LaBuy was correct in stating that the use of an assumed name to gain entry into the United States has been held to be ground for revocation, such statement is of no help in determining the issues in the case at bar. Each case must be considered in the light of its circumstances. As was said by Mr. Justice Frankfurter in *Baumgartner* v. U.S., 665,666:

> "As is true of the determination of all issues of falsity and fraud, the case depends on its own particular facts."

p. 670 "That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration. In reaffirming its importance we mean to pay more than lip service. But the rule does not relieve us of the task of examining the foundation for findings in a particular case. The measure of proof requisite to denaturalize a citizen was before this Court in *Schneiderman* v. *United States*, 320 U.S. 118. It was held that proof to bring about a loss of citizenship must be clear and unequivocal."

p. 675 "Non-fulfilment of specific conditions, like time of residence or the required number of supporting witnesses, are easily established, and when established leave no room for discretion because Congress has left no area of discretion. But where the claim of 'illegality' really involves issues of belief or fraud, proof is treacherous and objective judgment, even by the most disciplined minds, precarious. That is why denaturalization on this score calls for weighty proof, * * * ".

p. 676 "We are fully mindful that due observance of the law governing to grant citizenship to aliens touches the very well being of the Nation."

Judge LaBuy found, contrary to the facts, that an assumed name thwarted investigation. There was no proof that the investigation was hindered in any way.

Judge LaBuy said, p. 337:

"In an application for citizenship it is indispensable that true identity be disclosed. The unexplained use of an assumed name by this defendant thwarted investigation as to his eligibilty for United States citizenship."

Judge LaBuy, without any evidence to support his conclusion assumed that the use of the name Maglio was un-

explained. There was not a scintilla of evidence to show that true identity was not disclosed. There is no evidence that any investigation has been thwarted or hampered in any way. The matter of identity and the name used came before the Naturalization Judge when petitioner was granted citizenship.

The Immigration Statute, Title 8 § 1447, provides for the change of name in the discretion of the court upon the bona fide prayer of the petitioner. A Naturalization Judge would no doubt obtain the facts before the exercise of discretion. The judge would naturally inquire to see if the prayer was bonafide. We are left to guess, without evidence, as to what the Naturalization Judge had been told. The important fact, overlooked by the courts below, is that the judgment of the Naturalization Court precludes this further inquiry into the eligibility of DeLucia for citizenship, concerning his conduct as a person of good moral character.

Judge LaBuy, as Your Honors perceive, has said that (p. 334):

> "* * * This defendant thwarted investigation as to his eligibility for United States Citizenship."

There is no evidence that any investigation was thwarted. Eligibility was defined by statute. Judge LaBuy has not pointed to one absent qualification. The entry was lawful, the required residence took place, the required procedure was observed. Character and fitness was passed upon by the Naturalization Court. It appears that every time the District Court found a gap in the evidence, Judge LaBuy not only concluded that it was unexplained, but the District

Court went further and held that it was incumbent upon petitioner to explain. The District Court, with the approval of the Court of Appeals, regarded petitioner as if he had been an alien seeking naturalization, or an alien endeavoring to resist deportation.

The effect to be given to the judgment admitting petitioner to citizenship was ignored.

The District Court stated abstract principles of law concerning failure to reveal a criminal record without findings to make such abstract principles applicable.

We next consider the cases cited by Judge LaBuy under the following, (p. 333):

> "The fact that an applicant fails to reveal his criminal record is also grounds for cancellation of a naturalization certificate."
>
> *Corrado* v. *United States*, 227 F. 2d 780.

Several points distinguish this case from the case at bar. The defendant Corrado had been arrested numerous times, including arrests during his probationary period. The defendant testified in contradiction of the Preliminary Examiner, p. 782:

> "The trial judge indicated strongly that he believed the testimony of the preliminary examiner. The opinion of the trial judge on the credibility of witnesses, is of course, not reviewable on appeal.
>
> The brunt of appellant's complaints on this appeal is that, unless the Government could show that he would have been denied citizenship on the unproven charges made in the warrants of arrest, his citizenship should not be canceled now for his deception in the statement that he had never been arrested, especially in view of the fact that his only convictions were misdemeanors, or minor offenses."

Judge Martin said, (p. 783):

> "In *Knauer* v. *United States*, 328 U.S. 654 it is made plain that an appellate court must observe Civil Procedure Rule 52 (a), 28 U.S.C.A. which requires that due regard be given to the determination by the trial judge of the credibility of witnesses. The trial judge here stated clearly that he did not believe the testimony of appellant. He stated his belief to be that appellant 'deliberately falsified his position with the intent of misleading the examiner;' and that these false statements were material to the issue. The trial judge expressly found that the Government had relied upon the appellant's misrepresentation concerning the material matter of his arrests."

Your Honors will not discover any such finding in the opinion rendered by Judge LaBuy. The record is devoid of any evidence to support such a finding if it had been made. Your Honors will please keep in mind that in the case at bar there was no ground for the application of Rule 52 (a) in the manner it was applied in *Corrado*. In the case at bar no question concerning the credibility of any witness arose before Judge LaBuy. The Court of Appeals in the case at bar said:

> "The fact that an applicant for citizenship conceals from the government his criminal record is a ground for refusing naturalization."

The Court of Appeals in support of this conclusion cited *Corrado* v. *United States* 227 F. 2nd 780. But the Court of Appeals failed to explain the manner in which said proposition had any connection with the questions presented in the case at bar.

We respectfully complain here of such haphazard findings. What is meant by the phrase "conceals from the government"? There is no evidence that petitioner concealed anything from the examiners. There is no evidence

that petitioner concealed anything from the Naturalization Court.

United States v. *Montalbano*, 236 F. 2d 757, 236 F. 757.

Montalbano was in State Prison serving a life sentence at the time the Government sued, 134 F. Supp. 230. The opinion of Judge Lord shows that he was indicted three days before he filed his declaration of intention. We quote p. 231:

> "The defendant testified that he had disclosed his arrests, but the examiners said they were not important if he had not served time. This testimony was clearly denied by the examiners and is unworthy of belief. The same defense was presented in *United States* v. *Corrado*, 121 F. Supp. 75, where citizenship was revoked."

The Court of Appeals in Montalbano said, p. 759:

> "The records clearly justify the conclusion that each defendant deliberately concealed his criminal record and in so doing committed fraud on the government which supports the revocation of citizenship."

Your Honors will please note that *Montalbano* and *Corrado* presented questions involving credibility of witnesses. The case at bar does no such thing. The examiners who testified in the case at bar were unable to give any testimony concerning what petitioner may have said because they did not remember him. Petitioner did not testify, so his credibility was not involved.

United States v. *Ashler*, 147 F. 2d 544.

This defendant was convicted of a felony and arrested several times during the critical period. Your Honors will note please that in the case at bar no question was raised concerning the probationary period. This fact alone distinguishes many of the cases cited. The courts below failed to observe this distinction.

United States v. *Accardo*, 208 F. 632.

The Court of Appeals adopted the opinion by Judge Hartshorne, 113 F. Supp. 783. After the defendant filed his Declaration of Intention and before his petition for citizenship, he was indicted and concealed the arrest. After his petition was approved and before his hearing, he was again indicted and was on bail at the time of his hearing. The subsequent conviction on this indictment showed that he had been engaged in criminal activity during his probationary period. Here again we remind Your Honors that in the case at bar, there was no allegation of any misconduct during the probationary period. No evidence was introduced to suggest that petitioner was not eligible because of misconduct during the probationary period.

Stevens v. *United States*, 190 F. 2d 880.

The District Court denied a petition for citizenship. The defendant appealed. The Court of Appeals had previously sent the case back directing the Naturalization Judge to make findings. Judge Major said in affirming the subsequent denial (p. 882):

> "* * * we must keep in mind that the burden is upon the petitioner to establish every condition upon which admission to citizenship is dependent."

The courts below in the case at bar failed to distinguish between cases involving application for citizenship and those where revocation was sought. Otherwise the *Stevens case* would not have been cited.

The District Court, with the approval of the Court of Appeals, erroneously threw into the scales an inference of guilt against petitioner for the reason that he availed himself of the protection of the Fifth Amendment.

We next examine the cases cited by Judge LaBuy under the following, (p. 334):

> "The defendant was present in the courtroom throughout the trial and had opportunity to present

evidence on his own behalf. His failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain away the government's evidence."

The Court of Appeals said, (p. 79):

"The court pointed out that DeLucia was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf."

The Court of Appeals did not again cite the cases cited by Judge LaBuy. We are unable to ascertain from the opinion of the Court of Appeals just how much weight was given in that Court to the silence of DeLucia. All we know is that the Court of Appeals considered itself bound by the findings made by Judge LaBuy. We respectfully contend to Your Honors that the Court of Appeals should have perceived that the rule announced by the District Judge should not have been applied in the case at bar. The Court of Appeals adopted a rule, dangerous to due process, in conflict with the decisions of this Honorable Court. This is especially true in view of the fact that Judge LaBuy made a mistake in not recognizing the constitutional right of DeLucia to remain silent. It was error to draw unfavorable inferences from the exercise by petitioner of the right guaranteed him by the Fifth Amendment.

The Government was improperly permitted by the courts below to throw into the scale against him the assertion by petitioner of his Fifth Amendment privilege before a Notary Public.

The evidence before Judge La Buy was concluded April 10, 1957. (Vol. I, p. 243) Sixty-five days were allowed for briefs. The memorandum opinion rendered by Judge

LaBuy was filed June 7, 1957. (Vol. I, p. 325) Your Honors decided *Grunewald v. United States*, 353 U.S. 391, on May 27, 1957. The record gave counsel no warning in the advance of the opinion rendered by Judge LaBuy that the District Judge would apply a rule of evidence based upon the silence of DeLucia. The opinions rendered by the Court of Appeals were rendered June 18, 1958. The Court of Appeals did not refer to *Grunewald*.[9] Mr. Justice Harlan speaking for this Honorable Court said in *Grunewald*, p. 423:

> "But where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control to pass on such a question. This is particularly so because in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used."

Mr. Justice Black, with whom the Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan joined, concurring said, p. 425:

> "I agree with the Court that use of this claim of constitutional privilege to reflect upon Halperin's credibility was error, but I do not, like the Court, rest my conclusion on the special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitu-

> tion. To the extent that approval of such a rule in *Raffel v. United States*, 271 U.S. 494, has vitality after *Johnson v. United States*, 318 U.S. 189, 196-199, I think the *Raffel* case should be explicitly overruled."

It will be remembered that in the case at bar there was no question of the credibility of DeLucia, or of any other witness. The question submitted in the case at bar appears to have been simple compared with *Grunewald*.

We repeat from the above quotation from Mr. Justice Black:

> "The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them."

In the case at bar, petitioner was penalized for reliance upon his privilege. The Court of Appeals perceived that it was improper to penalize petitioner to the extent of a fine for contempt, but the Court of Appeals failed to notice that Judge La Buy destroyed the constitutional privilege with a penalty far greater than a fine.* Judge La Buy made use of the claim of privilege to bolster up the case for the Government.

In *United States v. Minker*, 350 U.S. 179, Your Honors held that Section 235(a) of the Immigration and Nationality Act of 1952 does not empower an immigration officer to subpoena a naturalized citizen who is the subject of an investigation by the Service to testify in an administrative proceeding before such officer, where the purpose of the investigation is to determine whether good cause exists

* The Court of Appeals reversed the contempt sentence in a separate opinion, herein p. 85 but said nothing about the contempt in the case at bar.

for the institution of denaturalization proceedings against such citizen under § 340 (a) of the Act.

In the case at bar Your Honors are called upon to decide, after taking this step away from the officials, if the Government shall be permitted to retain the next step in the program.

Mr. Justice Douglas said concurring in *Minker*, p. 197:

> "There is another reason for reading the section narrowly. When we deal with citizenship we tread on sensitive ground. The citizenship of a naturalized person has the same dignity and status as the citizenship of those of us born here, save only for eligibility to the Presidency. He is a member of a community included within the protection of all the guarantees of the Constitution. Those safeguards would be imperiled if prior to the institution of the proceedings the citizen could be compelled to be a witness against himself and furnish out of his own mouth the evidence used to denaturalize him. I would require the Government to proceed with meticulous regard for the basic notions of Due Process which protect every vital right of the American citizen."

In the case at bar, the Government instituted its suit and then sought to compel the citizen to be a witness against himself and furnish out of his own mouth the evidence to be used to denaturalize him. As we have said, when petitioner refused to furnish such evidence out of his own mouth, the District Court, with the approval of the Court of Appeals punished him by regarding an insufficient case as sufficient.

In *Minker*, Mr. Justice Black concurring said, p. 195:

> "It seems even clearer that immigration officer's powers under § 235 are not applicable in denaturalization cases. Section 340 of Title III of the Act, 66 Stat.

260, 8 U.S.C. § 1451, provides for revocation of naturalization. Responsibility for initiating such cases is placed on district attorneys 'upon affidavit showing good cause therefor. . . .' Many of the grounds for denaturalization are also grounds for felony prosecutions. Under these circumstances it is not surprising that Congress expressly placed responsibility for instituting denaturalization proceedings on district attorneys, leaving them to summon persons to appear as witnesses in the traditional manner before grand juries or courts. It would have been surprising had Congress attempted to authorize the Nation's chief prosecuting officer and his subordinates to compel a citizen to appear in government private offices to answer questions in secret about that citizen's conduct, associations and beliefs. Some countries give such powers to their officials. It is to be hoped that this country never will."

Your Honors will note that Mr. Justice Black said concerning district attorneys:

> "* * * leaving them to summon persons to appear as witnesses in the traditional manner before grand juries or courts."

In the case at bar the District Attorney required petitioner to appear in his chambers before a Notary Public. Because of the refusal on the part of petitioner to cooperate and assist the Government, the courts below punished him by throwing his refusal into the scale against him.

Mr. Justice Frankfurter speaking for this Honorable Court in *Minker* said, p. 190:

> "All these considerations converge to the conclusion that Congress has not provided with sufficient clarity that the subpoena power granted by § 235(a) extends over persons who are the subject of denaturalization investigations; therefore Congress is not to be deemed to have done so impliedly. Since this is so, we are

not called upon to consider whether Congress may empower an immigration officer to secure evidence, under the authority of a subpoena, from a citizen who is himself the subject of an investigation directed toward his denaturalization."

In the case at bar Your Honors are called upon to consider whether the Rules of Civil Procedure are to be regarded as authority for the District Attorney to secure evidence from a citizen against whom a suit has been brought seeking his naturalization.

Mr. Justice Black concurring in *Minker* said, p. 191:

"The immigration officer summoning Minker was not a judge or 'grand jury' of any kind, nor was he at the time acting in any quasi-judicial capacity. *Cf. In re Oliver*, 333 U.S. 257. He was acting under his broad power as a law enforcement officer to follow up clues and find information that might be useful in later civil or criminal prosecutions brought against persons suspected of violating the immigration and naturalization laws. See *e.g.* § 287, Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. § 1357; 8 CFR §§ 287.1-287.5. The object in summoning Minker was to interrogate him in the immigration officer's private chambers to try to elicit information 'relating to the possible institution of proceedings seeking the revocation of . . . (Minker's) naturalization. . .' Information so obtained might be used under some circumstances in court to take away Minker's American citizenship or convict him of perjury or some other crime. Thus the capacity in which this immigration officer was acting was precisely the same as that of a policeman, constable, sheriff, or Federal Bureau of Investigation agent who interrogates a person, perhaps himself a suspect, in connection with murder or some other crime. Apparently Congress has never even attempted to vest FBI agents with such private inquisitorial power. Indeed, this Court has construed congressional enactments as designed to safeguard persons against

compulsory questioning by law enforcement officers behind closed doors. *McNabb* v. *United States*, 318 U.S. 332; *Upshaw* v. *United States*, 335 U.S. 410. And we have frequently set aside state criminal convictions as a denial of due process of law because of coercive questioning of suspects by public prosecutors and other law enforcement officers in their official chambers. See, *e.g.*, *Watts* v. *Indiana*, 338 U.S. 49; *Harris* v. *South Carolina*, 338 U.S. 68; *Chambers* v. *Florida*, 309 U.S. 227. Yet power of the Attorney General and Immigration officers to compel persons, including suspects, to appear and subject themselves to questioning by law enforcement officers in their private chambers is precisely what the Department of Justice claims here.

This is no less true because a federal judge must be called on to 'aid' the immigration officer in subjecting a summoned person to questioning. § 235(a), 66 Stat. 198, U.S.C. § 1225(a). For after a court order, as before, the person summoned must go to an immigration officer's private chambers for questioning by him, out of which may come a prosecution against the 'witness' for perjury or some other crime. A purpose to subject aliens, much less citizens, to a police practice so dangerous to individual liberty as this should not be read into an Act of Congress in the absence of a clear and unequivocal congressional mandate. I think the Act relied on here by the Department of Justice should not be so read. I would hold that immigration officers are wholly without statutory authority to summon persons, whether suspects or not, to testify in private as 'witnesses' in denaturalization matters. For this reason I concur in the Court's judgment in this case."

In the case at bar, the attorney for the Immigration Officer notified DeLucia to appear in his office before a Notary Public. The suit had been instituted upon suspicion, upon allegations later proved to have been false. To object in summoning DeLucia was to interrogate him in the office

of the United States Attorney. Your Honors in *Minker* considered the intent of Congress as to subpoena power. In the case at bar, Your Honors are respectfully requested to consider the same sort of practice which has continued by virtue of the Federal Rules of Civil Procedure. When the District Judge was informed that petitioner stood on his constitutional rights, that should have ended the matter. But, instead, the District Judge penalized petitioner by shifting the burden of proof to him in the civil proceeding. The remedy allowed by the Court of Appeals was the reversal of the contempt case. The shifted burden was permitted to stand.

We respectfully submit that the case at bar presents a question not heretofore answered by Your Honors, except in principle. The answer is important to millions of naturalized citizens. The question posed is

> Can the Government proceed against a naturalized citizen with a design to revoke his certificate without evidence, file the complaint, based upon falsehoods, and then put in motion the rules applicable to ordinary civil suits, in order to compel the citizen to either furnish evidence against himself or suffer reprisals?

VIII.

Summary of Argument.

A mere statement of the question presented should require no argument. The question here posed is . . . has there been an abuse of the Federal Rules of Civil Procedure? Did the courts below overlook limitations placed upon the Rules by the law concerning due process. Were constitutional protections ignored? ..... p. 20.

We review some of the authorities to show that the procedure sanctioned by the court below should be compared

with bringing a prospective defendant before the prosecutor where he should be required to either prove his innocence or have his silence used against him. We assert that such program violates the spirit of our laws. ..... pp. 20 to 30.

The Court of Appeals erred in considering that it was bound by the findings of fact made by the District Court. The Court of Appeals failed to pay heed to the appropriate decisions rendered by this Honorable Court admonishing the Court of Appeals that in denaturalization cases, the upper courts have a duty to re-examine the findings of fact. ..... p. 30.

The courts below failed to observe the rule laid down by this Honorable Court to the effect that in denaturalizations cases the Government is limited to matters properly charged in the complaint. The courts below disregarded the complaint or accepted conclusions and made haphazard general findings. ..... p. 31.

The conclusion of law in the courts below was that the certificate was illegally and fraudulently procured. The findings are general. It is impossible to ascertain from them upon what underlying facts the District Court relied. It is impossible to determine from them upon what findings the Court of Appeals affirmed. The question presents itself as to whether or not this Honorable Court should remand to the District Court for the purpose of making adequate findings. ..... p. 32

The order of naturalization entered in 1928 is *res judicata*. The Government is estopped and the District Court was without jurisdiction to denaturalize petitioner on the grounds said by Judge LaBuy to support the decree. ..... p. 34.

In order to argue the apparent deficiencies existing in the findings made below, we respectfully pose a number of questions. ..... p. 40.

We argue the case cited by the District Judge are not of much help. ..... p. 41.

We point out that findings made by the District Court concerning matters not in dispute might very well have confused the issue in the Court of Appeals. ..... p. 45.

We point out that the District Judge treated the matter of the name used by petitioner when he applied for naturalization as if it were a basic issue. As a matter of law, the name used was immaterial. ..... p. 46.

We point out that the Court of Appeals improperly added to the findings of the District Court. In so doing, the Court of Appeals exceeded its appellate jurisdiction. The Court of Appeals is not a fact finding body. ..... p. 51.

We point out that the failure upon the part of the Court of Appeals to re-examine the evidence to determine if the findings of Judge LaBuy were based upon the evidence caused the Court of Appeals to overlook the significance of the refusal of Judge LaBuy to find certain facts. p. 54.

We argue that the District Court failed to distinguish between cases falling into the following categories, namely

(1) Applications for citizenship.

(2) Revocation of citizenship.

(3) Deportation of aliens. ..... p. 55.

We assert that the District Court announced a conclusion of law not applicable to the case at bar. An examination of the cases on the subject of name demonstrates a failure to distinguish cases. ..... p. 56.

We argue that Judge LaBuy found, contrary to the facts, that an assumed name thwarted investigation. There was not proof that the investigation was hindered in any way. ..... p. 57.

We argue that the District Court found as a fact that investigation had been thwarted, which finding was contradicted by the evidence. ..... p. 58.

We argue that the District Court stated abstract principles of law concerning failure to reveal a criminal record without findings to make such abstract applicable. p. 59.

We argue that the Government was improperly permitted by the courts below to throw into the scale against him the assertion by petitioner of his Fifth Amendment privilege before a Notary Public ..... p. 62.

IX.

Prayer for Writ.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued directed to the United States Court of Appeals for the Seventh Circuit, that the decree and judgment be reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

Paul De Lucia

By
Wm. Scott Stewart

Counsel for Petitioner.

Opinions

In the

United States Court of Appeals

For the Seventh Circuit

No. 12093 SEPTEMBER TERM, 1957. APRIL SESSION, 1958.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAUL DE LUCIA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 18, 1958

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* In a denaturalization proceeding in which §340(a) of the Immigration and Naturalization Act of 1952[1] was invoked to sustain the jurisdiction of the district court, a decree was entered on June 11, 1957, revoking, setting aside and making void an order of said court, entered September 27, 1928, admitting Paul De Lucia, also known as Felice De Lucia, to citizenship. From that decree De Lucia has appealed.

In the denaturalization proceeding, appellee, sometimes hereinafter referred to as the government, filed its complaint on October 10, 1956 against De Lucia, and there was attached thereto an affidavit by Charles Gordon, Re-

gional Counsel for the Northwest Region, Immigration and Naturalization Service, United States Department of Justice, dated August 9, 1956, as required by said § 340 (a). In his affidavit Gordon deposed and said that, as said Regional Counsel, he had access to the official records of said Service, "from which the following facts appear: * * *." There follows a recital of pertinent facts as to De Lucia.

Relying on *United States* v. *Zucca*, 351 U.S. 91, De Lucia contends that an affidavit showing good cause is a prerequisite to the maintenance of a denaturalization proceeding, and, while the affidavit was submitted under the pretense that it shows good cause, affiant's assertions therein are not dependent upon his knowledge, and that, although he swears that he has access to the official records of the Service, he does not claim he is the custodian thereof or that the files were complete, but he merely states his "opinion as to what may be shown by some files."

The question of the sufficiency of this affidavit has been resolved by *Nowak* v. *United States*, ... U.S. .....[2] In accordance with that decision, we hold the Gordon affidavit sufficient.

The complaint alleged that on or about April 10, 1928, pursuant to the Immigration and Naturalization Act of June 29, 1906, De Lucia, who was born in Naples, Italy, on or about November 14, 1897, filed in the court below a petition for naturalization in the name of Paul Maglio, and therein prayed that his name be changed to Paul De Lucia; that on September 27, 1928 that court admitted him to citizenship.

The complaint further alleged that in his declaration of intention dated January 9, 1925, attached to and made a part of his petition, De Lucia alleged under oath that his name was Paul Maglio and that he had been born in Apricena, Italy on July 10, 1898; that in the preliminary form of the petition for naturalization dated February 21, 1928 he stated that his full, true and correct name was Paul Maglio; that he had used the name of Paul De Lucia because he "got married on that name"; that his mother's name was Torelli Nunzia Maria; that he was born July

[2] No. 72, October term, 1957, decided May 26, 1958.

10, 1898, in Apricena, Italy; that he arrived in the United States at New York August 10, 1920, on the SS Ryndam; and that he further alleged under oath that he had never been arrested.

The complaint further alleged that De Lucia, in his petition for naturalization aforesaid, alleged under oath that his name was Paul Maglio; that he was born on July 10, 1898 in Apricena, Italy; that he had arrived in New York at the port of New York City on August 10, 1920 on the vessel Ryndam.

The complaint charged further that the aforesaid allegations of De Lucia were false and known by him to be false in the following particulars:

(I) His name was Felice De Lucia and not Paul Maglio;

(II) He was born November 14, 1897 in Naples, Italy and not on July 10, 1898 in Apricena, Italy;

(III) His mother's name was Maria Annunziata and not Torelli Nunzia Maria;

(IV) He had been arrested and convicted of voluntary homicide under his true name of Felice De Lucia on May 18, 1917 in Naples, Italy;

(V) De Lucia's entry into the United States at New York City on August 12 (*sic*) 1920 was unlawful and there was not attached to his petition for naturafization a certificate of arrival for a lawful entry into the United States for permanent residence.

The complaint further charged that De Lucia assumed the identity of Paul Maglio in order to conceal his true identity, to hide from the immigration officers at the time of his arrival and from the naturalization examiners and the naturalization court the fact that he previously had been arrested and convicted for voluntary homicide in Naples, Italy; and that he had fled from Italy in order to escape arrest for a subsequent prosecution.

The complaint further charged that the Immigration and Naturalization Service, relying upon the foregoing false and fraudulent representations by De Lucia, did issue a

certificate of arrival in the name of Paul Maglio, which De Lucia appended to his petition for naturalization; that the concealments and misrepresentations of De Lucia heretofore set forth were deliberately, wilfully and intentionally made in the proceedings leading to his naturalization in order to deceive the naturalization examiners and the court, and further to conceal material facts from them by failing to reveal his true identity and his record of criminality prior to entering the United States; that the concealments were further made to conceal his lack of good moral character and the defendant's lack of attachment to the principles of the Constitution of the United States, to prevent the making of a full and proper investigation of his qualifications for citizenship, to induce the Immigration and Naturalization Service to rely upon the false representations and concealment of the material facts, to make the unconditional recommendation to the court that his petition for naturalization be granted, and, further, to preclude inquiry by the court concerning his qualifications and eligibility for citizenship and to procure naturalization in violation of the law; that the naturalization of the said Paul De Lucia formerly known as Felice De Lucia was procured by concealment of material facts and by wilful misrepresentation, in that he deliberately and intentionally made false statements in the proceedings leading to his naturalization as set forth above.

The complaint prayed for a decree revoking and setting aside the order of the court admitting De Lucia to citizenship, and for general relief.

Defendant filed an answer denying every allegation in the complaint.

Following a trial before the court, the trial judge filed a memorandum which was ordered to constitute findings of fact and conclusions of law. De Lucia's motion for a new trial was overruled and the decree of denaturalization, from which this appeal is taken, was entered.

To establish its case the government introduced evidence, consisting of documentary exhibits, the oral testimony of various witnesses and the deposition of another. De Lucia offered no evidence.

In its memorandum, after a detailed recital of the relevant evidence, the court found (1) that defendant is the Paul De Lucia to whom a certificate of naturalization was granted September 27, 1928 and that he used the name Paul Maglio when he entered this country and when he applied for a certificate of naturalization; (2) that the government has conclusively shown that the defendant, Paul De Lucia, was not Paul Maglio, born July 10, 1898 in Apricena, Italy; (3) that he falsely assumed the name of Paul Maglio to enter this country; (4) that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and (5) thereby committed a fraud on the court, and also (6) that the evidence clearly establishes that Paul De Lucia and Felice De Lucia are one and the same person. The court further found (7) that in an application for citizenship it is indispensable that true identity be disclosed, and (8) that the unexplained use of an assumed name by this defendant thwarted investigation as to his eligibility for United States citizenship.

The court pointed out that De Lucia was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf.

The court stated as a conclusion that De Lucia had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such failure and misrepresentation foreclosed any further inquiry on the part of the naturalization office.

The court held that the use by De Lucia of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him.

While the court did not expressly indicate what it meant by the words "the concealment of other material facts", it is apparent to us from the context of the memorandum that the court had in mind De Lucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum.

We are aware that, when the government seeks to de-

which must be met with evidence of a clear and convincing character. *Schneiderman* v. *United States*, 320 U.S. 118, 123. From our examination of the record in this case we are convinced that the government has here met its burden. The district court's findings of fact are fully supported by the evidence and, therefore, we are bound by those findings.

Its conclusions of law and the decree which it entered find ample support in the decided federal cases.

The use by an alien of an assumed name to gain entry into the United States, is ground for deportation, *Landon* v. *Clarke*, 239 F. 2d 631, unless satisfactorily explained, *United States* v. *Schlotfeldt*, 94 F. 2d 263. No attempt to explain such use is made in this case. Such use, in attaining citizenship, by naturalization, is sufficient ground for revocation thereof, inasmuch as concealment of one's true name is an effective impediment to an investigation or inquiry relative to the person involved. Had De Lucia used his own name at all relevant times, a path of inquiry leading to his criminal record would have been opened to the government.

The fact that an applicant for citizenship conceals from the government his criminal record is a ground for refusing naturalization, *Stevens* v. *United States*, 190 F. 2d 880, or for ordering denaturalization, *United States* v. *Usher*, 147 F. 2d 544; *United States* v. *Manfalbano*, 236 F. 2d 757; *Corrado* v. *United States*, 227 F. 2d 780; *United States* v. *Accardo*, 208 F. 2d 632, adopting 113 F. Supp. 783.

It seems that De Lucia in this court contends that he cannot be denaturalized because the order of naturalization entered in 1928 is *res judicata*. He supports his contention by citing some of the syllabi from *United States* v. *Kusche*, 56 F. Supp. 291. This effort has brought forth from government counsel this opus:

> "Res judicata, as a defense in these proceedings, literally has been killed by drowning under the inundation of decisions released, first in *Johannessen* v. *United States*, 225 U.S. 227, for fraudulent procurement, in *United States* v. *Ness*, 245 U.S. 319, and in *Maney* v. *United States*, 278 U.S. 17, and *United States*

> v. *Ginsberg*, 243 U.S. 472, for illegal procurement of citizenship. Wilful mis-representation and concealment of material facts in these cases have only opened the judicial floodgates wider and killed the defense deader. . . . Surely the defense here has been thoroughly necrotized."

More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and mis-representations by which the entry of the order of naturalization was illegally and fraudulently procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding.

In his brief De Lucia, under Proposition of Law VI, states: "The Trial Court erred in admitting the exhibits and giving them probative value." He cites no authorities in support of this statement. He merely says "See Argument," without referring to any part of the argument and certainly to no page number. The argument consists of 90 pages of printed matter running continuously without titles or breaks, and we do not feel obligated to attempt to locate the part to which reference is intended to be made by counsel.

Again, he states in Proposition of Law VII, the following:

> "It was error for the Trial Court to allow evidence of custom and to give same probative value."

He cites *Cafari v. United States*, 217 F. 2d 404, which furnishes a clue enabling us to locate the part of his argument which pertains to this proposition.

We construe De Lucia's contention that it was error "to allow evidence of custom" to mean that the evidence of custom in this case was inadmissible because it was incompetent. However, only the question of *materiality* (not *competency*) was raised by his objection to the admission of two basic government exhibits, a preliminary form for petition for naturalization, and a document known as a face brief. These documents were introduced by the government on the theory that they were made according to the established custom and practice in the Service.

It is elementary that De Lucia, having objected to the admissibility of these exhibits solely on the issue of materiality, is in no position to raise in this court an objection to their competency as evidence.[3] "Materiality", with reference to evidence, means the property of substantial importance and it has been said that evidence is material where it is relevant and goes to the substantial matters in dispute or has a legitimate or effective bearing on the decision of the same, while evidence is competent if it is fit for the purpose for which it is offered. 31 C.J.S. 868, 906. "Competency", in the law of evidence, is the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court of justice; — applied, in the same sense, to documents or other written evidence. Black's Law Dictionary (1950) 355.

However, it is clear to us that, on the basis of evidence of custom in the naturalization service,[4] these documents

[3] *Employers Mut. Casualty Co. v. Johnson*, 201 F. 2d 153, 155.

28 U.S.C.A. rule 46 provides:

"* * * it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court * * his objection to the action of the court and his *grounds* therefor; * * *." (Emphasis supplied.)

[4] It appears from the testimony of Andrew Jordan, who is a retired district director of immigration and naturalization, that he was familiar with the custom in the naturalization service and knew the handwriting of George McKay (McKay died before the trial) and Stephen Durisch, that on the face brief he made a pencil notation "J" indicating himself and "9-27-28" indicating date of admission on final hearing. He also testified that the initials "G.M." under the heading "Adjournments" and following the words and figures "from APR 10 10-28" were written by examiner McKay, and that the handwriting under the heading "Result of Examination" and the notation "Arr. no" is in the handwriting of examiner Durisch.

In reference to question 24 in preliminary form for petition for naturalization, which reads: "Have you ever been arrested?", followed by the word "no" in handwriting, Jordan testified that a pencil check mark above the word "no", according to the practice, would indicate that either the preliminary examiner or the designated examiner made the check mark at the time he was questioning the petitioner and that the applicant answered "no".

Durisch testified that all of the handwriting in ink on the front of the face brief is his, and that his initials "SD" appear thereon. He further testified that the date August 10, 1920 on the face brief indicates when the naturalization petitioner arrived in the United States, and his continuous residence thereafter, and that "Arr. no" means applicant was asked whether he had been arrested and that his answer was "no".

As to the preliminary form for petition for naturalization, Durisch testified that he made black ink marks along the left side of various lines, a procedure governed by instructions, which were for the purpose of showing that the examiner read each question to the applicant and that the latter's oral answer agreed with that on the preliminary form.

All of this testimony was given without objection.

were admissible. Nothing in the *Cufari* case indicates that such records are not admissible. In fact, no such question was there raised. The court said, at 408:

> "The controlling question here * * * is whether Cufari was asked, either at his preliminary examination or at the hearing in the Superior Court of the Commonwealth of Massachusetts, whether he had ever been arrested and had answered in the negative."

The court then, at 409, proceeded to consider a docket slip, being Labor Form 2328 (which is similar to the face brief in this case), and also the testimony of the district director of immigration and naturalization as to the practice of examiners in asking applicants for citizenship if they had ever been arrested and noting applicants' answers on their docket slips. The court did not have before it and did not discuss any question as to the admissibility of such evidence. Hence the *Cufari* case is no authority on that question. As to the *effect* to be given to such evidence, the court held:

> "No doubt Cufari's docket slip coupled with the evidence of the practice and custom of Examiners generally and of Examiners Davis and Mahoney in particular is enough to establish by the balance of the probabilities that Cufari was asked if he had ever been arrested and answered that he had not. * * *"

Thereupon, the court went on to decide the case *upon the foregoing evidence*, considered in connection with the fact that *Cufari, testifying on his own behalf, said that he had no recollection of being asked about arrests either at his preliminary examination or at the hearing on his petition in court.* Differing from the lower court's conclusion, it held that the government had not proved its case by that clear, unequivocal and convincing evidence which did not leave the issue in doubt, and hence it reversed the district court. But in the case at bar, De Lucia did *not* testify and there was no contradictory evidence leaving the issue in doubt.

For the reasons herein set forth, the decree of the district court is affirmed.

AFFIRMED.

In the

United States Court of Appeals

For the Seventh Circuit

No. 12094 SEPTEMBER TERM, 1957 APRIL SESSION, 1958

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. PAUL DE LUCIA, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 18, 1958

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Defendant appeals from an order of the district court adjudging him guilty of contempt of that court in violating an order entered in the case of *United States of America* v. *Paul De Lucia,* then pending in said court, and fining him $500 therefor.

It appears that, while a denaturalization proceeding brought against De Lucia was pending in the district court,[1] the government proceeded to take his deposition before a notary public, where he was duly sworn, and that (according to an affidavit of the assistant United States attorney assigned to the prosecution of the denaturalization case), during the course of the examination,

[1] An appeal from a judgment against De Lucia in said case was heard in this court. We affirmed. ..... F. 2d .....

government counsel asked De Lucia a series of questions, and that, "on the advice of his attorney William Scott Stewart, and also on his own initiative the defendant refused to answer the questions on the basis of the Fifth Amendment to the Constitution of the United States, asserting that to answer the same would tend to incriminate him."

The examination by government counsel commenced, as follows:

Q. Will you state your name?

A. Paul De Lucia.

Q. Where do you live, sir?

A. 1515 Bonnie Brae, River Forest.

Q. Mr. De Lucia, on January 9 of 1925, did you file with the Clerk of the Circuit Court of Cook County a declaration of intention, No. 162822, to become a citizen of the United States of America under the name of Paul Maglio?

A. I respectfully refuse to answer. I don't want to be witness against myself, and I will declare the privilege of the Fifth Amendment.

Q. And at this time, you honestly believe that if you answered that question, you would tend to incriminate yourself?

A. I refuse to answer.

Mr. Stewart: He refuses to answer that question, too.

Mr. Bickley (government attorney): Q. Mr. De Lucia, on February 21, 1928, did you cause to be filed with the District Director of Naturalization in the Federal Building, Chicago, Illinois, your preliminary form for petition for naturalization, No. 370-55072, under the name of Paul Maglio?

A. I refuse to answer for the same reason.

Q. Do you honestly believe that if you answered that question, it would tend to incriminate you?

A. I refuse to answer for the same reason.

The interrogation by government counsel proceeded along the same general lines and the record shows that De Lucia's answer as aforesaid was repeated over 100 times.

The notary public, having certified to the court the aforesaid proceedings, the court, on the government's

motion, ordered that defendant answer the oral interrogatories posed at his deposition within three days. Thereafter the government showed De Lucia had failed to answer said interrogatories and moved the court to enter a rule on him to show cause why he should not be held in contempt of court, upon which motion the court deferred its ruling until after the trial of the denaturalization case. On the same day the court denied defendant's motion for reconsideration of its order requiring defendant to answer oral interrogatories. After the trial in the denaturalization case had ended, the district court allowed the government's motion for a rule to show cause and granted defendant 10 days to answer the rule, which he did. He therein relied, *inter alia*, upon "the privilege guaranteed by the Fifth Amendment". The contempt order followed.

The law is settled that the provision of the Fifth Amendment "that no person * * * shall be compelled in any criminal case to be a witness against himself" must be accorded liberal construction in favor of the right it was intended to secure. *Hoffman* v. *United States*, 341 U.S. 479, 486. It has also been held that the privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. *Hoffman* v. *United States*, *supra*, and *Blau* v. *United States*, 340 U.S. 159.

In the *Hoffman* case, the court said, at 486:

> "* * To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. 'The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'"

It is apparent from the record before us that De Lucia was claiming his privilege under the provision of the Fifth Amendment and that government counsel and the

notary public so understood it. He did so against the background of the pending denaturalization proceeding. It is obvious that his answers, if required, would furnish a link in the chain of evidence needed by the government to prosecute De Lucia for a federal crime. To us it appears clear that he was entitled to rely upon the privilege which he claimed. That being so, it was error to adjudge him guilty of contempt of court.

Therefore, the order from which this appeal has been taken, is reversed.

REVERSED.